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BRIEF FOR
UNITED STATES OF AMERICA, APPELLANT

United States Court of Appeals
For the District of Columbia Circuit

Nos. 12,017 and 12,018

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED APR 1 1954

UNITED STATES OF AMERICA, Appellant,

v.

UNION TRUST COMPANY, ET AL., Appellees.

Joseph W. Stewart

CLERK

Appeal from the United States District Court
for the District of Columbia

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**United States Court of Appeals
For the District of Columbia Circuit**

Nos. 12,017 and 12,018

UNITED STATES OF AMERICA, *Appellant*,

v.

UNION TRUST COMPANY, ET AL., *Appellees*.

**Appeal from the United States District Court
for the District of Columbia**

**BRIEF FOR THE UNITED STATES OF AMERICA,
APPELLANT**

JURISDICTIONAL STATEMENT

These are appeals from judgments of the United States District Court for the District of Columbia entered against the United States in two actions brought under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* The complaints (I 12A, 17A)¹ were filed on October 26, 1950. The cases were consolidated and tried before District Judge Matthew F. McGuire whose Memorandum Opinion (I 36A-46A), filed May 5, 1953, is reported at 113 F. Supp. 80. One month later, the Government moved for a new trial or, in the alternative, for reconsideration of the determination of liability of the United States (I 46A). This motion was de-

¹ Record references throughout this brief are indicated as follows: the roman numeral refers to the volume of the printed Joint Appendix; the arabic number refers to the page of that volume; "Tr." refers to the typewritten transcript of trial.

nied by an Order and accompanying Memorandum filed June 30, 1953 (I 48A). On that same date, Findings of Fact and Conclusions of Law were filed (I 49A) and Judgments were entered adjudging that appellees recover damages from the United States, in the amount of \$50,000 in No. 12,017, and \$15,000 in No. 12,018 (I 55A, 57A). The Government filed its notice of appeal in each case on August 27, 1953 (I 58A, 59A). The jurisdiction of this Court is invoked under 28 U.S.C. 1291-4.

STATEMENT OF THE CASE

1. *Nature of the litigation.*—Appellee's decedents were passengers on an Eastern Air Lines DC-4 which collided in mid-air with a P-38 military type plane, owned by the Bolivian Government, while in the vicinity of the Washington National Airport on the morning of November 1, 1949. All of the 51 passengers and the crew of 4 on the Eastern plane were killed in the accident. Eric Rios Bridoux, an officer of the Bolivian Air Force, who was the pilot and only person in the P-38, was injured but survived.

As a result of the accident more than a hundred suits were brought in this and in other jurisdictions against Eastern Air Lines, Bridoux and the United States. Virtually all of the claimants have stipulated with the defendants (I 34A) that the final decision in appellee's four suits on behalf of Mr. and Mrs. Miller—two against the United States and two against Eastern and Bridoux—shall bind all on the question (a) of the liability of the defendants, and (b) of whether the Wrongful Death Statute of Virginia or of the District of Columbia is applicable.²

The four suits were consolidated for trial. Those against Eastern and Bridoux were tried by a jury while, at the same time, the suits against the Government were tried by District Judge Matthew F. McGuire.

The complaints in the suits against the Government alleged that both the Eastern and the Bolivian aircraft were in radio contact with Government employees stationed

² Under the relevant Virginia statute recoveries in death actions were limited to \$15,000 (§ 5787, Virginia Code, 1942), but there is no limitation under the District of Columbia law (16 D. C. Code 1201-1203).

in the control tower of the Washington National Airport,³ and that the control tower personnel, by negligent or wrongful acts or omissions, so directed the approach of the planes as to cause the collision (I 14A, 18A). Later, the appellee specified particular acts of negligence upon which it intended to rely and these were incorporated in the pre-trial order dated September 19, 1952 (I 21A).⁴ The Government's answers denied the material allegations, asserted that the complaints fail to state a cause of action upon which relief may be granted (I 15A, 19A), that the claims are exempted from coverage of the Tort Claims Act by 28 U.S.C. 2680(a), and that the tower operators were exercising a discretionary function (I 27A).

2. *The facts of the accident.*—(a) The following are the facts to the extent they are revealed by the pre-trial stipulation of the parties, the District Judge's findings, and such testimony as is not in dispute:

Eastern's flight No. 537, originating in Boston, was en route from New York to Washington with 51 passengers and 4 crew members aboard. The plane was a four

³ The Washington National Airport is the only civil airport in the United States, apart from emergency landing strips, which is owned and operated by the United States.

⁴ While the language of the complaints charged affirmative negligent acts, appellee's particularization of the alleged negligence of the tower, as set forth in the pre-trial order, relate only to omissions. In substance, they assert that the tower operators failed to issue a "timely" warning to the Eastern plane that the P-38 was on final approach, failed to warn the P-38 that the Eastern plane was on final approach, failed to require the Eastern plane to follow the prescribed landing pattern, and failed to take appropriate action to separate the planes so as to avoid the collision (I 23-24A). Appellee listed nine specifications of negligence, two of which (items "g" and "h" [I 24A]) were later withdrawn (Tr. 2838).

Appellee asserted that Eastern was negligent under the doctrine of *res ipsa loquitur* and, alternatively, in that the DC-4 pilots failed to maintain a proper look-out, failed to maintain effective control of their plane and care for their passengers, failed to take appropriate steps to avoid the collision, violated certain air regulations, and deviated from the prescribed landing pattern (I 22-23A). The alleged deviation is based on the fact that the DC-4, while west of the field and flying in a southerly direction, failed to continue until it was south of the City of Alexandria before turning around to line up with the runway, as prescribed by the pattern (see p. 4, fn. 6, *infra*); instead, the DC-4 made a "short cut", *viz*, when it was about at the end of the field, it began to turn east (thus cutting across and in front of the P-38 which was proceeding north), and continued around until it headed toward the runway. See, Tr. 127-132; IV 853-4A, 869-870A.

As to Bridoux, appellee asserted that he was negligent in failing to see the DC-4 (Tr. 129-130).

engine DC-4 equipped with dual controls for the pilot and co-pilot.⁵ When the plane was over Beltsville, Maryland, some 15 miles northeast of the Washington National Airport, it contacted the Airport control tower by voice radio over a frequency of 119.1 megacycles, and at 11:38 A.M. was cleared by the tower to enter a left traffic pattern for landing on runway number 3 (I 21-2A, 49-50A).⁶

One minute before the Eastern plane was cleared to enter the traffic pattern, the P-38—with Bridoux, the Bolivian officer, at the controls—had taken off from runway

⁵ Captain George Ray, an experienced DC-4 pilot, was in command of the aircraft (IX 1906-8A). The co-pilot, C. R. Hazlewood, although otherwise experienced as a flyer, had only recently finished the company training program to qualify as a DC-4 pilot (IX 1908-9A). There is no finding as to which of the two was controlling the plane when the accident occurred.

⁶ 119.1 is the radio frequency generally used for messages between the control tower and approaching civil or commercial planes (VI 1263-4A). Airport control towers supervise and control air traffic operating in the vicinity of airports. They are usually manned by CAA employees known as air traffic controllers. Their functions, which are described *infra*, pp. 27-29, are analogous to those of a traffic policeman at a busy highway intersection (II 273-4A, IV 862A, VII 1353A). The particular positions and duties of the several traffic controllers in the tower were detailed at trial (I 185A *et seq.*; VI 1259A *et seq.*). Aircraft operating in the vicinity of an airport are required by Air Traffic Rules to maintain contact with the tower.

A plane approaching Washington for a landing usually contacts the airport control tower when it is 15 to 20 miles away (VI 1260A, 1296A). Scheduled commercial aircraft approaching Washington from the north, upon reaching the Beltsville area, receive permission from their company radio station to leave the company frequency and to contact the control tower (IX 1910-5A). From the time of this initial radio call to the tower until it lands, an arriving aircraft which is operating under visual flight rules (VFR), as distinguished from instrument flight (IFR) (See I 188-194A), remains in contact with the CAA employee in the control tower who is designated the "local controller" or "A position". In this initial radio contact with the tower, the pilot may request landing instructions and the local controller will respond by giving a clearance to enter the traffic pattern, as distinguished from clearance to land. (I 188-9A, VI 1260-1A.) The traffic pattern, which is also referred to as the landing pattern, is the prescribed flow of traffic around the immediate vicinity of the airport (II 262A, VII 1348-1353A; see Pltf's Ex. 7, XI 2128A-3). At that time the local controller advises the pilot of the wind conditions, the runway to be used, and he gives such traffic information as he deems pertinent. He also requests the pilot to report again at a situs closer to the airport, usually at Haines Point. (I 188-9A, VI 1260A, VII 1346A.) Upon reporting from the latter point, the pilot is advised of the traffic he is to follow and of his number in the sequence, or if he is the first aircraft in the pattern, he may be cleared to land at that time (*ibid.*). If he is not the first plane in the sequence, he is expected to continue flying around the airport in the pattern (X 2036A).

A plane ordinarily does not enter the traffic pattern until it receives a tower clearance, and once within the pattern, it does not land until the tower gives a specific clearance to land (X 2036A, 2029-2030A; 14 Fed. Reg. pp. 3341-3342, § 26.50-65(a) and (b)).

Runway 3 at the Washington National Airport heads in a generally northerly direction, more precisely, 30 degrees east of north (Tr. 112-113). The prescribed path for a plane landing on runway 3 is as follows: The plane

3 on a test flight (I 37A).⁷ Radio communication between the P-38 and the tower was on a frequency of 126.18 megacycles, a frequency reserved by the tower for military craft (II 391A, VI 1265A, 1273A). In communicating with the tower by radio before actual take-off, Bridoux identified himself as "Bolivian 927" (the P-38 bore the identification number NX-927) (VI 1276A).

From the time the P-38 took off until after the accident, weather conditions at the airport were excellent. Visibility was 15 miles; ceiling was 6,500 feet with scattered clouds at 3,500 feet; and surface wind from the northeast was 20 to 25 mph. Both planes were visible to the control tower personnel who knew the planes were on converging paths and had adequate opportunity to give warnings and instructions to each plane (I 22A, 50A).

At approximately 11:46-11:47 A.M., while both planes were south of the field on final approach for landing on runway 3, the P-38 and the DC-4 collided in mid-air at an altitude of approximately 300 feet (I 21A, 49A). The P-38 had overtaken the DC-4 from above and behind, striking the top of the DC-4 just behind the trailing edge of the wing (V 1008-1014A, VI 1313A). The DC-4 broke in two; the back half of the plane fell to the ground in Virginia landing near the edge of the Potomac River; the forward section, with the wings and engines, went into the water and was recovered at a point several hundred feet

enters the traffic pattern at a point north of the field in the general vicinity of the Pentagon; it proceeds in a southerly direction parallel to the runway, but west of it (this southerly flight is called the *downwind leg*); then, when it is below Alexandria, the plane makes a 90 degree left turn and proceeds easterly beyond a point where the path of flight intersects an imaginary line extending from runway 3 (this easterly flight is called the *base leg*); then, the plane makes a 90 degree left turn and proceeds northerly, making a slight S-turn to line up directly with runway 3 (this northerly flight is called the *final approach*); and then the plane lands. (Pltf's Ex. 7, XI 2128A-3; X 2108A.)

⁷ The twin engine P-38, which was not a new plane, had recently been sold to the Bolivian Government by a private firm (VIII 1780A, III 528A). Bridoux was testing the plane preparatory to flying it to Bolivia (II 379A, VIII 1781-2A). He intended to fly for about a half hour (II 401A). Called as a witness for the plaintiff-appellee, Bridoux asserted that during the week before the accident he had attempted to fly the P-38 but encountered trouble with the brakes, with one engine and with the radio (II 381-4A, III 529-530A). The brakes and the engine were repaired and a new radio was installed before November 1st (*ibid.*, IX 1783A). These were checked and appeared in good condition before he took off (II 391A, 395A).

from the shoreline. Parts of the planes and sundry debris were scattered on the ground and in the water. The P-38 crashed in the water. See *e.g.*, Eastern Ex. Nos. 10 and 11 A, XI 2162-3A; III 485A; VIII 1741A; VI 1287A.

The boundary line between Virginia and the District of Columbia is the mean high water mark on the Virginia shore of the Potomac River. 59 Stat. 552.

(b) The District Court's Findings and the Opinion are entirely silent as to what intervened between the time the P-38 took off at 11:37 when the DC-4 was over Beltsville until the time of the collision. Indeed, apart from the conclusionary findings as to negligence, ~~the Court made few findings as to negligence~~, the Court made few findings beyond the facts which the parties stipulated to before trial. Accordingly, this crucial nine to ten minute gap in the findings can only be filled by reference to the testimony, much of which is in serious conflict:

Glen D. Tigner, the local controller ("A position") in the tower, called as a witness by the Government, testified that when the DC-4 reported that it was over Beltsville and requested landing instructions, he cleared it to enter the traffic pattern and advised the pilot to contact him at a point closer to the field (VI 1277-8A, VII 1346A). This message was overheard by appellee's witness, M. C. Shaw, a National Airlines pilot flying from Philadelphia to Washington, who received a similar clearance to enter the traffic pattern immediately after the DC-4 was given its clearance (I 81-6A, 114-6A). A little later, when the DC-4 was closer but still north of the airport, it contacted the tower and Tigner then gave it clearance to land on runway 3 (VI 1278-9A). Shortly afterward he observed the P-38 at a high altitude circling Alexandria; it was about seven miles south of the airport, heading easterly, starting a turn to the left (VI 1280A, XI 2160A-4). It was not then in the traffic pattern (IX 1862-4A, 1940A).

At that moment Tigner was busy talking into his microphone to another plane (VII 1561A). An associate in the tower advised him that the P-38 was requesting landing

instructions (VI 1280-1A).⁸ Tigner then called the pilot of the P-38: "I called 'Bolivian 927, Washington tower, cleared to enter left traffic pattern, runway 3,' and gave him the wind and requested that he check downwind leg, west of the airport" (*ibid.*, VIII 1613-4A). But there was no acknowledgment (*id.*). Tigner saw the plane continuing its left turn, then in a northwesterly heading, still about seven miles south of the airport. He again called, "Bolivian 927" and when there was no response, he called, "Bolivian 927, did you request landing instructions?" This time the P-38 pilot answered saying he had requested and wanted landing instructions. Tigner then "reissued the clearance into the pattern—'Bolivian 927 cleared to enter left traffic pattern, runway 3,'—and gave him the wind and asked him to report [while on his] downwind leg west of the airport" (VI 1281A, 1303-4A). This time the message was acknowledged (*ibid.*).⁹ By then the P-38 was about five miles southwest of the airport, now on a northwest heading, but continuing to circle in a left turn (VII 1363A).

When Tigner next saw the P-38 it was again approximately five miles southwest of the airport at an altitude of about 4000 feet, but now heading northeasterly, with its gear down, and it was in a steep and rapid descent (VI 1281-2A, XI 2160A-5).¹⁰ At about this time the tower alerted the DC-4 to the presence of the P-38: appellee's witness Shaw testified that at 11:45 A.M., while his

⁸ Because of the great amount of traffic at the airport (see *infra*, pp. 27-28, fn. 51; cf., pltf's Ex. No. 27, XI 2157A) and because the tower operators are so busy when traffic is heavy, the tower operators of necessity work together as a team (I 207-8A).

⁹ Sgt. W. S. Buckwalter, a control tower operator at Bolling Field, testifying for appellee, said that he heard the Washington tower give landing instructions to the P-38. While not recalling the exact words, he indicated it was a routine instruction such as is issued *on initial call*, giving the type of traffic pattern the plane is to fly, telling him where to check for a landing clearance, giving him the altimeter setting, and the wind (V 902-5A, 912-3A). He heard this on 126.18, the military frequency which was the one used by the P-38 (V 902A).

¹⁰ The clearance given the P-38 moments before to enter the traffic pattern would permit the P-38 to descend from 4000 feet to 1200 feet (which is the minimum altitude of the traffic pattern) while heading northeastward toward the airport (IX 1824A, 1940-1A). The fact that a plane's gear or flaps are down while flying in the pattern is neither unusual nor particularly significant (VII 1511A, IX 1946A).

radio was tuned to 119.1 (the DC-4's frequency), he heard the tower warn the DC-4 that there was a P-38 in traffic, and he heard the tower give the DC-4 the position of the P-38 (I 89-92A, 119-122A; Tr. 517-531). When Tigner observed the continued rapid descent of the P-38, he called, " "Bolivian 927, make a 360 to your left. You are No. 2 to land. Traffic is an Eastern DC-4, turning final ahead and below you.' " (VI 1282A, 1304-5A, 1310A).¹¹ But the message was not acknowledged, nor did the plane comply with this instruction (VI 1282-3A). By then the P-38 was about four miles from the airport, still descending rapidly (VI 1283A). Thinking that perhaps the Bolivian pilot did not know the meaning of the phrase "make a three-sixty", Tigner then called, "Bolivian 927, turn left, turn left. You are No. 2 to land, following an Eastern DC-4 turning final ahead and below you" (VI 1283A, 1308A, VII 1368A, XI 2160A-5). But again there was neither an acknowledgment nor any compliance (*ibid.*).¹² During these transmissions, the DC-4 was on its base leg, roughly at a right angle to runway 3, turning all the time, from base leg into final approach (VI 1283A). At the end of the transmission, the DC-4 was approximately a mile from the end of the landing strip but still in its left turn; the P-38 was about two miles from the strip somewhat east of an imaginary extension of runway 3, not lined up with it (VI 1283-4A, 1305-8A, VII 1447-8A), flying in a northeasterly direction (VI 1310A). The two planes were about a mile apart (VI 1308A).

When he saw that the P-38 was not going to comply with his instructions to make a 360 degree turn or to turn left, Tigner transferred to 119.1 megacycles and called, " "Eastern 537, make an immediate left turn. Traffic is

¹¹ This meant that the P-38 was instructed to make a 360 degree turn, that is, a complete circle from its present position, so as to permit it to be spaced properly behind the Eastern plane; that the P-38 was number 2 to land; that an Eastern DC-4 which was turning toward final approach ahead and below the P-38, was in traffic, and that the P-38 was to land after the Eastern plane (VI 1310-1A). But an instruction from the tower that a plane is No. 2 to land does not constitute a clearance to land (VIII 1664A, VII 1447A).

¹² Appellee's witness Buckwalter, the Bolling Field control tower operator, confirmed that the Washington tower tried to contact the P-38. He overheard a voice on the military frequency calling, "Bolivia, Bolivia" (V 906A).

P-38 above and behind you' '' (VI 1284A). The DC-4, which had gone only a quarter of a mile while actually on final approach (IV 734-5A, 743A, VI 1302A), started to level off at once and began a slight left turn when the P-38, never having altered its direction, overtook and hit it (VI 1284A, 1305A).¹³

The control tower operators testified that the P-38 was never given a clearance to land; that the only clearance given was to enter the traffic pattern; that the P-38 acknowledged that clearance; that a plane is presumed to be following the last clearance or instruction which it has acknowledged; that the minimum altitude of the traffic pattern is 1200 feet and that it was not until the P-38 appeared likely to continue its descent below that altitude could the tower determine that it was attempting to land straight-in rather than only entering the pattern; that a straight-in approach for landing from an altitude of 4000 feet is not normal (VII 1446-7A, IX 1824-6A, 1940-8A, VI 1305A). There is no testimony to show that Eastern's pilots took any action to avoid the collision until the last moment although from the description of the paths of flight it seems clear that the P-38 could have been seen by the DC-4 pilots.

Bridoux, called as a witness for plaintiff-appellee, gave a somewhat different version of what happened before the collision.¹⁴ His testimony at trial also differed in a number of points from his own statements made to the CAB shortly after the accident. He testified that he took off from runway 36,¹⁵ that he flew north and began a left turn

¹³ Tigner's testimony as to these events was corroborated in substantial detail by both Donovan Davis and Robert Union, two other control tower operators on duty at the time (VII 1557A, *et seq.*; VIII 1571A, *et seq.*; VIII 1610A *et seq.*). Appellee's witness Shaw, while piloting a National Airlines plane, overheard the tower warning the DC-4 to "Look out for the P-38." He said that this message came about one minute after he had heard the tower warn the DC-4 that the P-38 was in traffic. I 99-100A, 125A, 144A.

¹⁴ Over Government objection (II 402A, 403-5A, 423A), the trial judge permitted appellee to treat Bridoux as an adverse witness and to examine him through leading questions (II 387A, 402A). While this may have been proper in appellee's suits against Eastern and Bridoux, we contend it was prejudicial in the suits against the Government. Bridoux was not a party defendant in the Government cases and was not adverse to appellee there.

¹⁵ Runway 36 heads due magnetic north. Bridoux said he deliberately used runway 36 instead of runway 3 because it was longer and because of the trouble he had had the week before. But other witnesses asserted that he took off on runway 3 (VI 1276A, VII 1560A, VIII 1611A; see also X 2119A, 2122-3A) and, on this point, the trial court did not accept Bridoux's story (I 37A).

around the Pentagon when his right engine began alternately to lose and gain power (II 397-402A, III 491A). This was about a minute after take-off (II 401A). When he was about 1½-2 miles west of the tower, flying south, he called the tower, reported engine trouble and requested landing instructions (II 402-3A, 406-7A). He was then at an altitude of more than 2,000 feet and was climbing constantly (II 407A). There was no immediate answer from the tower, so he began to circle the tower counter clockwise (II 408A). The tower responded while he was flying north over the Potomac River between the Washington National Airport and Bolling Field (II 408-411A). The tower asked if he was requesting landing instructions; he replied, "Yes, because I got engine trouble."¹⁶ The tower then said, "Land 2 on Runway 3," and gave him the wind direction, altimeter setting and the time (II 411A, 416-7A). He acknowledged (II 411A). By this time he had ascended to 3,500 feet (*id.*) and was at a speed of about 175-180 mph (II 413A). He understood "Land 2 on Runway 3" to mean that there was another plane ahead of him; that he was to land behind that other plane; and—contrary to testimony of tower personnel (VIII 1664A, VII 1447A)—that this message itself constituted his clearance to land rather than merely clearance to enter the traffic pattern (II 416-7A, III 613-4A).¹⁷

When this communication ended, he was at a point northwest of the tower, and from that point he flew another complete circle around the tower, but now descending constantly, and reducing speed to 150 mph (II 411-3A). Upon completing this circle he had descended to about 2,400 feet. He then flew southerly, parallel to runway 3, until he intercepted the downwind leg of the traffic pattern (II 414-5A). He was then about 2 miles west of the south end of the airport (II 415A) de-

¹⁶ None of the other witnesses testified to hearing or receiving any report of engine trouble (*E.g.*, VI 1329, VII 1446).

¹⁷ In a statement to the CAB a few days after the accident, Bridoux said he did not regard his as an emergency situation (II 545-6A). At trial he took the opposite view (*ibid.*). He admitted, however, that the P-38 performs well on only one engine (III 523A) and that he had no trouble climbing to 3500 feet (III 491A).

scending at the rate of 500 to 600 feet a minute (II 427A). While flying to this point, Bridoux said he saw a plane making a final approach for a landing either on runway 36 or 3 "and I realized that that was the reason I was No. 2 to land" (II 425A). He recognized the plane as either a Beechcraft C-45 or a Lockheed C-60 (Lodestar), both of which are military planes, have twin rudders, and are similar in appearance (II 425-6A).¹⁸

He continued flying south until he was about 5 or 6 miles south of the field, and then he made a 90 degree left turn (II 429-430A).¹⁹ It was at that point, he said, that he observed the Lockheed or Beechcraft on the ground taxiing toward the buildings (II 426A, 430A). He said he never actually saw the plane make its landing (III 524-5A).²⁰ Upon completing the last mentioned turn he was on base leg. He flew for about 1¼ miles and then made another 90 degree left turn to proceed on final approach. He was then to the right side of an imaginary line projecting from runway 3 but about 4½ miles south of the field (II 430-1A, 433A). He was headed north (II 434A) flying at 150 mph and at an altitude of about 1,200 feet (II 432-3A). He said that at that point he called the tower, saying, "Washington Tower, Bolivian P-38 on final approach." The tower, he said, responded: "Bolivian P-38, prepare to land on runway 3," and then gave him the wind direction; he said he answered, "Bolivian P-38,

¹⁸ At about 11:43 A.M. an Air Force B-25 made a simulated instrument landing approach over runway 36. The pilot, practicing instrument landing, received clearance from the Washington tower for a low approach over runway 36. He flew over the runway at an altitude of about 200 feet, and then proceeded to Bolling Field where he landed. (IX 1963-5A). But Bridoux categorically denied that the plane he saw was a B-25 (III 518A). A B-25 is also a military aircraft having twin engines and twin rudders similar to the C-45 and C-60 (see *Jane's All the World's Aircraft*, 1945 Ed., pp. 202c, 279c, 292c). A Lockheed Lodestar did land at the airport that morning, but apparently this landing was made much earlier. The pilot of the Lodestar testified that his landing was made before Bridoux took off. The pilot stated that he observed the P-38 taxiing into position and then take-off after having landed himself (IX 1892A). A passenger in the Lodestar testified that the Lodestar landed some five minutes before the collision (III 651-4A).

¹⁹ In two statements made to the CAB a few days after the accident Bridoux said he flew only one or one and a half miles south of the field (III 540A, 536-7A).

²⁰ This, too, was contradictory of an earlier statement to the CAB (III 525A).

Roger" (II 431A). He then put his flaps down, reducing his speed to about 130 mph (II 438A), and began an S-turn so as to line up with runway 3 (II 434A, 436-7A). Then he heard over his radio the words, "Clear to the left, clear to the left" (II 438A). He thought the instruction was for someone on the ground (*id.*). He did not turn to the left or take any other action. The collision occurred two or three seconds later (II 438-9A).

Bridoux testified that he did not see the DC-4 at any time (II 440A). He testified that while descending at the rate of 500 to 600 feet per minute, his plane was nosed down at an angle of less than 10 degrees from the horizon (II 445-6A). But eyewitnesses described his angle of descent as 40 to 45 degrees (II 355A), 40 degrees (IV 737A), "very steep" (III 482A), 20 degrees (IV 671A), etc. There was also considerable variance between the witnesses as to the speed of the P-38 as well as of the DC-4 (*e.g.*, II 352A, IV 743A, V 888A, 1041-2A, etc.).

One characteristic regarding the radio equipment should be noted. As to the P-38, Bridoux testified that in order to transmit radio messages through his throat microphone, he had to depress one of several buttons on the control wheel (III 454A, 457A, 594A). However, by depressing that button, whether deliberately or inadvertently, the radio receiver automatically became muted (III 457-8A). Hence, if a message were being sent to him at the same time as he depressed the button in an attempt to transmit, he could not receive the message. As to the tower, three of the control tower operator stations were equipped each with a hand microphone and with a series of loud speakers located on the window sills in front of them. There was a separate loud speaker for each of several frequencies available (I 212-3A, 224-5A, VI 1263A). To transmit on certain frequencies the operator had to depress push-buttons, others were controlled by toggle switches (I 213-4A). But, as in the aircraft, when transmitting on a particular frequency, the corresponding loud speakers are automatically muted so as to prevent the talker's voice from coming back at the talker (I 224-5A, II 269A).

While it was possible for traffic controllers to transmit simultaneously on two frequencies, they were not supposed to do so because it would decrease the modulation with the result that neither plane might receive any message. For this reason, simultaneous transmission was not used (VII 1467A, II 244-7A).

Concerning the precise location of the mid-air collision, there was conflict of testimony as to whether the impact occurred over the land (hence in Virginia) or over the water (District of Columbia).

At the conclusion of appellee's affirmative case and again at the conclusion of the trial, the Government moved to dismiss on the grounds, *inter alia*, that the claims are not suable under the Tort Claims Act since they arose out of the performance of a governmental function, and that, in any event, appellee had failed to establish any negligence on the part of the Government (V 1022A, Tr. 2659 *et seq.*). The motion was denied (X 2084A).

3. *The decision of the District Court.*²¹—In his Memorandum Opinion (I 36-46A), the trial judge rejected the Government's contention that the Tort Claims Act excludes claims arising from the performance of a governmental function. The court held that when the Government assumed the responsibility of regulating air commerce and of regulating the flow of traffic at a public airport, it assumed the duty of protecting particular members of the public from the hazards "incident to such performance and implicit in its undertaking"; that violation of such duty is actionable; that the regulation of air commerce may be likened to the functions of the Coast Guard which, according to the judge, when negligently performed, create liability; and that the only governmental functions which

²¹ As to the defendants Eastern and Bridoux, the jury returned a special verdict finding Eastern negligent but Bridoux not negligent. The jury found that the collision occurred in the District of Columbia and awarded damages in the amount of \$50,000 to the Estate of Ralph Miller and \$15,000 to the Estate of Mildred Miller. I 55A, 57A.

are excluded from coverage of the Tort Act, are those specifically indicated in the Act's exceptions.

The trial judge found that the control tower personnel were negligent "in the circumstances in question in that, having in mind the respective positions of said planes in relation to each other and their speed of approach and descent: a) they failed to issue a timely warning to the Eastern plane concerning the P-38 being on final approach; b) they failed to warn the P-38 that the Eastern plane was on final approach; c) they cleared both planes for the same runway at approximately the same time; and d) they failed to keep both planes advised of the activities of the other."²² He found that the Government's negligence "concur[red] with the negligence of Eastern" in causing the accident (I 51A, 45A). He "concur[red] in the finding of the jury" that the collision occurred over the Potomac River within the boundary of the District of Columbia. As to damages, he "concur[red] in the verdict of the jury" and awarded \$50,000 for the death of Ralph Miller, \$15,000 for that of his wife.

A motion for reconsideration or a new trial (I 46A) was denied with brief comment (I 48A).²³

STATUTE INVOLVED

The pertinent portions of the Tort Claims Act²⁴ are set out in the Appendix, *infra*, p. 59.

²² I 50-51A. The court made no findings as to "the respective positions of said planes in relation to each other and their speed of approach and descent". His finding as to clearing both planes to land at the same time is not one of the acts of negligence charged by the appellee either in the complaint or in its specifications of negligence as set forth in the pre-trial order (I 23-24A).

²³ The Supreme Court's decision in the *Texas City* case (*Dalchite v. United States*, 346 U.S. 15) came down shortly after the District Court filed his Memorandum Opinion and was referred to extensively in the argument and briefs on the motion. One of the grounds for the motion was that the Tort Act requires application of the law of the place where the negligent acts occur (28 U.S.C. 1346(b)), that the negligent acts occurred in the tower in Virginia, and that the Virginia law limits recoveries in death actions to \$15,000.

²⁴ The Federal Tort Claims Act (Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U.S.C. 921 *et seq.*) was repealed but its provisions were revised and reenacted under the revision of the Judicial Code, effective September 1, 1948, 62 Stat. 683, 862. See, 28 U.S.C. 1346, 2671-2680.

STATEMENT OF POINTS

1. The complaints fail to state a cause of action upon which relief can be granted against the United States; the District Court erred in holding that appellee's claims are actionable under the Tort Claims Act.

2. The duties and functions of federal employees operating airport control towers are regulatory in nature and have no private analogy; the District Court erred in holding that such regulatory activities are actionable under the Tort Claims Act.

3. The supervision and control of air commerce is a governmental function; the District Court erred in holding that the Tort Claims Act does not exclude claims based upon the performance of a governmental function.

4. Appellee's claims arise out of the performance of discretionary acts of federal officials and therefore are within the discretionary function exception of the Tort Claims Act, 28 U. S. C. 2680(a); the District Court erred in failing to hold this exception applicable.

5. The air traffic controllers' duties to regulate air traffic properly are duties owed to the general public and breach of such duties does not create private rights; the District Court erred in holding to the contrary.

6. The traffic information and the landing clearances which air traffic controllers issue to planes are, under applicable regulations, subject to the controllers' judgment and discretion; the District Court erred in permitting such judgment to be judicially reviewed and in substituting its judgment for that of the responsible officials.

7. The District Court erred in failing to hold that, since the air traffic controllers would themselves be immune from liability, the United States, as their employer, is similarly immune.

8. The District Court erred in failing to find that the air traffic controllers were not negligent, and in determining an issue of negligence which was not within the scope of the pre-trial order.

9. The District Court erred in failing to make sufficient findings to indicate the factual basis for its conclusions that the tower operators were negligent.

10. The District Court erred in finding that the mid-air collision occurred over the District of Columbia, rather than over Virginia.

11. The District Court committed prejudicial error in permitting appellee to examine Bridoux through leading questions as an adverse witness although he was not an adverse party in appellee's suits against the United States.

12. Under the Tort Claims Act, the liability of the United States must be measured by "the law of the place where the act or omission occurred" (28 U.S.C. 1346(b)). Appellee's claims are based upon acts and omissions which occurred in the control tower in Virginia and it is the law of that State which must be applied. The District Court erred in applying the law of the District of Columbia.

SUMMARY OF ARGUMENT

1. The Tort Claims Act limits the liability of the United States to that which a "private individual" would have "under like circumstances" (28 U.S.C. 1346(b), 2674) and excludes claims arising from the performance of a discretionary function (28 U.S.C. 2680(a)). These provisions of the Act, as well as its legislative history, clearly demonstrate that the Act was not intended to permit suit on a claim arising from the performance of governmental functions, particularly those of a regulatory nature. This was confirmed by the Supreme Court in its recent decision in *Dalehite v. United States*, 346 U.S. 15, where the claims were based, in part, upon the Coast Guard's negligent performance of its protective and regulatory duties. There, and in *Feres v. United States*, 340 U.S. 135, 142, the Court emphasized that the Act permits suit only on "recognized" common law tort actions; it does not create unprecedented liabilities; nor does it permit recovery if the situation, when viewed in all the circumstances, cannot be equated to one which would predicate analogous private liability.

The opinion below, in utter disagreement with the rationale of the *Dalehite* decision, asserts that the Tort Claims Act is a "conspicuous example" "of the fact that the technical niceties hitherto drawn between what are governmental and other functions are rapidly being done away with * * * " (I 42-3A). The court below explicitly acknowledges that each of the negligent acts in this case occurred while the CAA tower operators were in the act of regulating and controlling interstate air traffic. Indeed, it is this very factor of regulation and control which was seized upon by the judge as the source of the duty alleged to have been breached: liability was imposed on the ground that when the Government undertook to regulate air commerce, it also assumed a duty of protecting particular individuals from the potential hazards of such regulation, and that violation of that duty creates private rights actionable under the Tort Claims Act (I 44A).

The result is the imposition of liability upon the Government for its negligence in the course of a regulatory function, a liability which is virtually without precedent. Under the Civil Aeronautics Act of 1938, the Government has established a vast and intricate system of airways and air navigation facilities and has promulgated air traffic rules and regulations to regulate air commerce in such manner as to promote the safe and the expeditious movement of traffic. Control towers, which exercise direct supervision over air traffic at airports, are a vital part of this system. The directions and instructions which the towers issue to aircraft in flight carry the same binding authority of law and have the same legal effect as the regulations themselves. Since no private individual has this power of regulation, there can be no parallel liability of a private individual "under like circumstances." And when the claims have no analogy to private liability in general tort law, they are excluded from coverage of the Tort Claims Act. *Dalehite*, 346 U.S. at 44.

2. The discretionary function exception alone bars recovery against the United States. This provision incorporates into the Act the historic principle that the courts will

not, in a private action, revise or review executive conduct involving the exercise of judgment or discretion of a public character. Under this principle it is firmly established that states and municipalities are immune from suit for the negligent performance of governmental functions, and the protection of life and property is universally regarded as a governmental or discretionary function. The rule of immunity has been applied in suits against municipalities for the negligent enforcement of highway and traffic laws, and for the negligent misdirection of traffic on the streets, whether by an automatic traffic signal or by a police officer. There were frequent references during the trial of this case to the close analogy between a traffic officer on the streets and the traffic controller in the airport tower. Unless a contrary legislative purpose appears in unmistakable language, regulatory statutes and laws aimed at protecting life and property impose duties on public officers which are owed to the public at large, not to particular members of the public. Thus, a private person cannot sue a municipality if, through negligence, its police failed to protect him from robbery, or if its fire department negligently failed to extinguish the fire in his house. Likewise, the tower operator's duties are public in nature and there can be no private suit for their breach.

Here, the tower was held negligent for failing to issue traffic information to the two planes involved. But the applicable regulations expressly provide that the only traffic information the tower need issue is that which the controller, in his judgment, believes necessary. It is not the function of the court to review or revise that judgment or to substitute its own for that of the official concerned. Similarly, the timing of issuing landing instructions are discretionary acts beyond judicial reach. Moreover, since their acts involve discretion and judgment, the traffic controllers would themselves be immune from liability. The United States is equally immune because, under the Act, it only assumed that liability which its employees would have.

3. The trial judge's findings that the tower personnel were negligent are expressly predicated upon "the respective positions of said planes in relation to each other and their speed of approach and descent." But the trial judge failed to make any findings on these crucial matters as to which there was great conflict in the evidence, and without detailed preliminary findings indicating the factual basis for the ultimate conclusion of negligence, as required by Rule 52(a), F.R.C.P., appellate review of the factual decision is foreclosed. Therefore, if the complaints do state a cause of action, remand for further proceedings is necessary.

4. The Tort Claims Act, in explicit terms, requires application of the law of the place where the negligent "act or omission occurred." 28 U.S.C. 1346(b). This is a departure from the general conflicts rule which ignores the place of the negligent conduct and, instead, applies the law of the place where the negligent conduct has its effect. Although the collision was found to have occurred in the District of Columbia, the allegedly negligent acts of the tower personnel occurred in the control tower, which is located in Virginia. The trial judge, ignoring the literal mandate of the Tort Claims Act, applied the District law instead of the Virginia law. There is no reason whatever for ignoring the rule prescribed by Congress. Under Virginia law, recoveries in death actions are limited to \$15,000, hence the award to the Estate of Ralph Miller should be reduced.

ARGUMENT

I.

APPELLEE'S CLAIMS AGAINST THE UNITED STATES ARE BASED UPON THE PERFORMANCE OF A GOVERNMENTAL FUNCTION AND, AS SUCH, ARE EXCLUDED FROM THE COVERAGE OF THE TORT CLAIMS ACT.

A. Introductory: the scope of the exclusion.

Although the Tort Claims Act constitutes a broad waiver of the Government's immunity from suit for tort, the waiver is not as absolute as the District Court construed it. The

waiver is subject to significant limitations. These appear in the Act by way of conditions²⁵ and exceptions.²⁶ And, just as the waiver of immunity must be given a construction which will accomplish its aim, so, too, the Act must be interpreted with "due regard for the statutory exceptions" and for "such restrictions as have been imposed" upon the right to sue. *Dalehite v. United States*, 346 U.S. 15, 31.

One of the basic limitations upon the coverage of the statute is the exclusion from the consent to suit of claims arising from the performance of acts of a governmental nature.²⁷ This exclusion, as the Supreme Court noted in the *Dalehite* decision (346 U.S. at 30-34), is rooted in three sections of the Act: §§ 1346(b) and 2674 which limit the liability of the United States to that which a "private individual" or "private person" would have "under like circumstances," and § 2680(a) which bars claims based upon the exercise of a discretionary function or duty. These sections preclude liability when the claim is one which, because of the characteristically governmental factors involved, cannot be equated to a situation which would predicate private liability.

Sections 1346(b) and 2674, confining the Government's liability to that of a private individual in like circumstances, of themselves bar claims arising from regulatory

²⁵ *E.g.*, liability is conditioned upon a negligent or wrongful act or omission of a government employee while acting within the scope of his employment. 28 U.S.C. 1346(b). Accordingly, the United States may not be held liable for the negligence of its employees occurring while they are on a frolic of their own (*King v. United States*, 178 F. 2d 320 (CA 5), cert. den. 339 U.S. 964); nor, on the theory of absolute liability, for engaging in an extra-hazardous activity (*Dalehite v. United States*, 346 U.S. 15, 45).

²⁶ Numerous exceptions are set out in 28 U.S.C. 2680.

²⁷ "The legislative history indicates that * * * it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function." *Dalehite, supra*, 346 U.S. at 28. "[C]ongressional thought was centered on granting relief for the run-of-the-mine accidents * * *." *Id.* at fn. 19. " * * * Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions." *Id.*, 346 U.S. at 32.

The *Dalehite* decision clearly overrules *Somerset Seafood Co. v. United States*, 193 F. 2d 631, 635 (C.A. 4) and *Cerri v. United States*, 80 F. Supp. 831, 883 (N.D. Cal.), to the extent that these cases refuse to recognize the Government's exemption from suit based upon the negligent performance of a governmental function. The court below, in holding the Government liable, relied primarily on these two cases (I 42A).

or police functions, or any governmental activity differing markedly from that which is carried on by a private person. In that connection the Supreme Court has twice emphasized that the effect of the Act "is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres v. United States*, 340 U.S. 135, 142; *Dalehite, supra*, 346 U.S. at 43-44. Both of these cases held squarely that recovery will be denied when plaintiffs can point to no liability of a private individual analogous to that which is asserted against the United States (*ibid.*).²⁸

The discretionary function exception in § 2680(a), on the other hand, bars liability for conduct customarily characterized as discretionary even though recovery might be had for comparable activities carried on by a private per-

²⁸ Thus, in *Feres*, involving negligently caused injuries to soldiers while on active duty, the Court said (340 U.S. at 141-2):

* * * One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability "under like circumstances," for no private individual has power to conscript a private army with such authorities over persons as the Government vests in echelons of command.

And in *Dalehite*, speaking with reference to the negligence of the Coast Guard in its fire fighting activities, the Court said that the Tort Claims Act (346 U.S. at 43-44):

* * * did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. An analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to "the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Here, as there, there is no analogous liability; in fact if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. * * * The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule.

See also, *National Manufacturing Co. et al. v. United States*, — F. 2d — (C.A. 8, decided Feb. 8, 1954) (no recovery for claims arising from misinformation negligently circulated by United States Weather Bureau: "If the activity is purely governmental there can be no liability under the Act * * *"). * * * The [weather] service is plainly of a governmental nature or function intended for the public at large and wholly for governmental purposes. It is dissociated from any private business counterpart * * *"; *Sigmon v. United States*, 110 F. Supp. 906, 910 (W.D. Va.) (federal prisoners may not recover for injuries sustained in prison since "no private individual has the legal right to hold any other private individual in penal servitude").

son.²⁹ The words "discretionary function or duty" were intended to convey the same meaning traditionally accorded them by the courts (*Coates v. United States*, 181 F. 2d 816, 818 (C.A. 8); cf. *Dalehite*, 346 U.S. at 34). They embrace the principle that the courts will not revise or review executive conduct which involves the exercise of judgment and discretion (see *infra*, pp. 33-48). The words were intended to exclude liability for governmental acts and to cover "not only agencies of government * * * but all employees exercising discretion" (346 U.S. at 33).

And the legislative history of this exception, much of which is related in the *Dalehite* decision (346 U.S. 24-30), dispels any doubt that the words were also intended to exclude claims based upon the regulatory activities of the Government, even when negligently performed. The Tort Claims Act was enacted in 1946 as Title IV of the Legislative Reorganization Act, 60 Stat. 842, after some twenty-seven different bills dealing with tort claims had been introduced in Congress since 1923. *Ibid*; *United States v. Spelar*, 338 U.S. 217, 219-221. Throughout this period the emphasis was on making the United States amenable for suit for the "ordinary common law torts" such as are involved in automobile accidents. 346 U.S. at 28. At the same time it was the consistent view of Congress that the important governmental functions should be protected and that suit should not be permitted on claims stemming from their performance. *Dalehite*, *supra*; see p. 20, fn. 27, *supra*. Many of the earlier bills had exceptions relating to specifically designated spheres of regulatory activity; there were, for instance, provisions exempting claims arising from the activities of the Federal Trade Commission and of the Securities and Exchange Commission.³⁰

Such specific exceptions were included in the tort claims bill which was introduced in the 77th Congress (H.R. 5373, sec. 303, 77th Cong., 2d Sess.). While that bill was under

²⁹ Section 2680(a) is divided into two phrases. The first "bars tests by tort action of the legality of statutes and regulations. The second is applicable in this case. It excepts acts of [discretion] in the performance of governmental functions or duty * * *." *Dalehite*, *supra*, 346 U.S. at 33.

³⁰ *E.g.* sec. 303(7) of S. 2690, 76th Cong., 1st Sess.; sec. 303(7) of H.R. 5299, 77th Cong., 1st Sess.

consideration, its provisions were revised and there was substituted the identical exception which now appears as section 2680(a). A committee memorandum, explaining the revised section of the bill which later became the Tort Claims Act, stated that it was "designed to preclude * * * application of the act to a claim against a regulatory agency * * *. * * * It is neither desirable nor intended that * * * the propriety of a discretionary administrative act be tested through the medium of a damage suit for tort."³¹ The exception was characterized as a "highly important" one and it was explained that its purpose also was "to avoid any possibility that the act may be construed to authorize suits against the Government growing out of a legally authorized activity," just because "the same conduct by a private individual would be tortious."³²

The question of whether the United States may be held liable, under the Tort Claims Act, for the negligent or wrongful performance of a regulatory function was directly in issue in four appellate cases and all have held to the contrary. *Dalehite, supra* (negligence of the Coast Guard in its "policing" and "supervising" shipboard loading, 346 U.S. at 24, 42);³³ *Schmidt v. United States*, 198 F. 2d 32 (C.A. 7), certiorari denied, 344 U.S. 896 (SEC investigation); *Matveychuk v. United States*, 195 F. 2d 613 (C.A. 2), certiorari denied, 344 U.S. 845 (OPA denial of rent increase); *Chournos v. United States*, 193 F. 2d 321 (C.A. 10), certiorari denied, 343 U.S. 977 (failure to grant grazing permit).

³¹ The memorandum continued, "Since the language used * * * exempts from the act claims against federal agencies growing out of their regulatory activities, it is not necessary expressly to except such agencies * * * by name * * *. However, the present bill is intended * * * to cover claims for common-law torts, such as those involving a motor vehicle collision, against * * * regulatory agencies." Memorandum for the Use of the Committee on the Judiciary, H. of Rep., 77th Cong., 2d Sess., Explanatory of Committee Print of H.R. 5373 (Jan. 1942), p. 8.

³² *Ibid.*; Hearings before the Committee on the Judiciary, H. of Rep., 77th Cong., 2d Sess., on H.R. 5373 and H.R. 6463, pp. 28, 33 (see also pp. 35, 44, 65, 66). This language was substantially incorporated in the Committee reports during the 77th Congress (S. Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H. Rep. No. 2245, 77th Cong., 2d Sess., p. 10), and in the House Report of the 79th Congress which enacted the statute (H. Rep. No. 1287, 79th Cong. 1st Sess., pp. 5-6).

³³ See also 346 U.S. at 42 where the Supreme Court said that ICC regulations could not be attacked in a Tort Act suit because of Section 2680(a).

Measured by these standards, the appellee's claims are fatally deficient: there is no analogous private liability in like circumstances, and, in any event, the claims are based upon the exercise of discretionary and regulatory duties of employees of a regulatory agency.

B. *There is no analogous private liability "under like circumstances."*

In determining whether or not there is analogous private liability "under like circumstances," it is important to observe initially that the comparison must be not only with some of the circumstances, but *all* of them. *Feres, supra*, 340 U.S. at 142. In *Feres* the Court did not stop once it found that the circumstance of one of the injuries was a negligently performed operation by a doctor on his patient, a circumstance which would support a private action for malpractice; nor in *Dalehite* did the inquiry halt once it was determined that one of the circumstances of the damage was that certain individuals, whose statutory duty required them to extinguish fires, were negligent in their efforts to extinguish and to prevent the spread of the fires. In both instances the Court went on to examine, and gave controlling effect to, those additional circumstances which, when considered with the others as a whole, revealed that the negligent acts related to functions peculiarly governmental in nature, thus foreclosing the possibility of analogizing the situation to one which could give rise to private liability.

Similarly, in the instant case, the allegedly negligent acts of the control tower operators must be considered not in isolation, but in the background of the activities involved. The function of the control tower is an integral and vital part of the over-all regulation of aeronautics by the federal government.

1. *Federal regulation of aviation.*—Civil aviation in all its phases, commercial and non-commercial, was made the subject of intensive federal regulation by the Civil Aero-

navitics Act of 1938, 52 Stat. 973, 49 U.S.C. 401, *et seq.*³⁴ The 1938 Act was intended to coordinate the Government's functions with respect to civil aeronautics into a single independent agency, to authorize stringent economic regulatory measures "designed to stabilize the air transportation industry", and to provide for "the regulation of air commerce in such manner as to best promote its development and safety."³⁵

The Act created a Civil Aeronautics Authority which, as modified by Congress Reorganization Plans III and IV,³⁶ was divided into (a) the Civil Aeronautics Board, an independent agency which performs "judicial" and "legislative" functions, and (b) the Civil Aeronautics Administration, a branch of the Department of Commerce which fulfills "executive" functions.

The CAB prescribes minimum standards for the design, construction and performance of aircraft; it prescribes regulations governing their inspection and maintenance; and it sets up qualifications for the issuance of certificates to airmen, aircraft and air carriers.³⁷ These rules are administered by the CAA which has duties of inspection, investigation and examination.³⁸ The CAB also regulates the business of air transportation, the routes, services, equipment, rates, records and financing of air carriers.³⁹ It investigates accidents to determine their probable cause⁴⁰ and conducts other formal administrative proceedings.⁴¹ And the CAB has the power and duty of prescribing air traffic rules governing the flight of all aircraft in air commerce.⁴²

³⁴ Although there had been earlier efforts at regulation (*e.g.*, the Air Commerce Act of 1926, 44 Stat. 568; the Air Mail Act of 1934, 48 Stat. 933, and its 1935 amendment, 49 Stat. 614), these had been spasmodic and piece-meal, had led to divided responsibility in different government agencies with consequent lack of coordination and efficiency, and were inadequate to correct the "chaotic situation" in which the air carriers found themselves. H. Rep. No. 2254, 75th Cong., 3d Sess., pp. 1, 2; see also F. A. Ballard, *Federal Regulation of Aviation*, 60 Harv. L. Rev. 1235 (1947).

³⁵ H. Rep. No. 2254, *supra*, p. 1; 49 U.S.C. 402(e).

³⁶ 5 Fed. Reg. 2107, 2421 (1940); cf. 53 Stat. 561, 5 U.S.C. (1940) 133-133r.

³⁷ 49 U.S.C. 551-555.

³⁸ *Ibid.*

³⁹ 49 U.S.C. 481-496.

⁴⁰ 49 U.S.C. 581-582.

⁴¹ 49 U.S.C. 641-649.

⁴² 49 U.S.C. 551(7).

The CAA is empowered to designate civil airways,⁴³ and to establish and operate air navigation facilities wherever necessary.⁴⁴ It arranges for the publication of aeronautic maps and charts and for the dissemination of aviation information.⁴⁵ It is authorized "to provide necessary facilities and personnel for the regulation and protection of air traffic."⁴⁶

Under this and earlier authority, a vast and intricate system of civil airways and air navigation facilities has been established.⁴⁷ Included within this complex organization is a network of hundreds of aeronautic communications stations, all interconnected by teletype and interphone, located along the airways with an average distance of 80 miles between stations. In cooperation with the United States Weather Bureau, these gather, coordinate and disseminate to aircraft in flight, weather and other information; and they maintain two-way radio communication with aircraft for purposes of safety and the expeditious movement of traffic, or guiding lost aircraft to a safe haven. Also included in the system are radio range stations, visual and radio beacons, giving directional and non-directional signals (these transmit radio and visual signals which, when received, are used by the pilots to fix a plane's position); "air route traffic control centers" (communication facilities located on route between cities which control and space air

⁴³ *I.e.*, a path through navigable air space (49 U.S.C. 401(16)); an "air highway" ten miles wide (I 109-110A).

⁴⁴ 49 U.S.C. 452 (a)-(c).

⁴⁵ 49 U.S.C. 452(a), 456.

⁴⁶ 49 U.S.C. 452(a).

⁴⁷ As early as 1920 the Post Office Department established aeronautical radio stations in connection with the operation of the air mail service. Under the Air Commerce Act of 1926, the operation of the airways was placed under the Bureau of Lighthouses of the Department of Commerce. In 1933, it was transferred to the Aeronautics Branch of the Department, and in 1934 it was placed under the Air Navigation Division of the Bureau of Air Commerce of the Department. In 1935 the air carrier companies recommended that the Bureau establish a uniform system of airway traffic control to prevent collisions of planes navigated on the airways and to expedite the movement of aircraft, and the following year, while awaiting appropriate legislation, the carriers themselves established airway traffic control centers. In July of 1936 the Bureau took over the operation of these facilities. Under the 1938 Act, as amended, air traffic control activity was placed under the jurisdiction of the CAA's Air Traffic Control Division and its Communications Operation Division. *Digest of Airways Operations Service*, Vol. I, pp. 2-3 (G.P.O., 1948).

traffic flying solely by instrument); radar installations; and other types of facilities among the most important of which are the airport control towers (directly involved herein). The Civil Aeronautics Administration has designated "control areas" (specified geographical areas within which air traffic control is exercised directly); and "control zones" (a defined area in the vicinity of an airport where additional flight rules are applicable).⁴⁸

2. *Air traffic control.*—(a) All air traffic is governed by regulations promulgated by the CAB.⁴⁹ Direct CAA supervision is accomplished by (a) air route traffic control centers, and (b) airport traffic control service. The centers are concerned primarily with aircraft navigating by instrument (IFR) and they supervise such craft during their entire flight.⁵⁰ The airport traffic service is concerned with the control of traffic within the vicinity of and on airports. It supervises both instrument (IFR) and visual (VFR) flight.⁵¹

⁴⁸ See, 14 C.F.R. 617.1; *Digest of Airways Operations Service*, Vol. I, pp. 5-6, 30-31 (G.P.O., 1948). In 1949, the CAA maintained some 748 radio range stations, 464 airway communication stations (where over 4000 people were employed), 30 air route traffic control centers (with over 1300 employees), 120 non-directional radio beacons, 94 instrument landing systems, 3 precision approach radar systems, and some 165 airport control towers (employing about 1900 people). See, *CAA Statistical Handbook of Civil Aviation*, p. 20 (G.P.O., 1953).

⁴⁹ See, 14 C.F.R., Part 617. The regulations applicable in 1949 are set out in 14 Fed. Reg., p. 3327 *et seq.*, Part 26.

⁵⁰ Instrument flight plans of aircraft must be submitted to and cleared by the centers before take-off. They maintain a progressive check on the location of such planes as reported by the pilots whose direction of flight is guided by signals emitted by the radio range stations. The centers provide separation of traffic proceeding on the same airway, or crossing it, by instructing planes flying IFR as to route, altitude, and even speed when necessary. Such intense supervision over flight by the CAA is not applicable with regard to visual flight rules (VFR). Under VFR, pilots provide their own separation, determine their own speeds, altitudes and routes subject only to compliance with the air traffic rules as to proper altitudes, right-of-way, etc.

⁵¹ The congestion of air traffic at the busier air terminals presented a problem which became more serious as aviation grew. What is said to be the forerunner of the present day control tower was first constructed in 1931 at the Cleveland, Ohio, airport. During the next five years, 20 other cities erected and operated towers, and by 1939 there were 52 towers being operated by municipalities. But there was no federal control over them until enactment of the Civil Aeronautics Act of 1938 under which regulations were promulgated governing the issuance of certificates of competence to tower operators. Although standard procedures, equipment installations and operating techniques of the towers were suggested by CAA, their adoption was not then required. By 1941, the war emergency had led to a great ex-

The principal functions of the airport traffic controllers are (a) to issue clearances to pilots with regard to taxiing, take-off, approach for landing, and landing; (b) to issue and relay information to pilots which will aid in the prevention of unnecessary delays and of collisions; (c) to supervise and control aircraft in the traffic pattern so as to effect separation between them; (d) to inform pilots as to field and weather conditions; and (e) to initiate emergency procedures when necessary.⁵²

When operating within the vicinity of an airport,⁵³ aircraft are required to maintain contact with the tower, either visually or by radio, so as to receive any instructions which may be issued,⁵⁴ and, when issued, such instructions must be followed.⁵⁵ All visible traffic in the control zone, includ-

pansion of aviation, many military air units were now based at civil airports, and the need for uniformity in airport traffic control was of pressing concern to both military and civil aeronautics. *Digest of Airways Operations Service*, Vol. I, pp. 23-25 (G.P.O., 1948). On November 1, 1941, CAA issued a *Manual of Operations* setting forth Standard Airport Traffic Control Procedures and shortly thereafter all certificated tower operators were required to apply them. 7 Fed. Reg. p. 742, Pt. 26, § 26.55. The 1938 Act had authorized the CAA to train civilian and governmental tower operators and a training program was now undertaken. *Digest, supra*, p. 40. In August, 1941, Congress appropriated funds for the maintenance and operation of a number of towers by the CAA. During succeeding years, through other appropriations and through the transfer of funds from the War and Navy Departments, CAA was able to take over, construct and operate additional towers in steadily increasing numbers. In 1943, it was operating some 100 towers. *Digest, supra*.

We are advised by CAA that by November 1949, the date of the accident, CAA maintained and operated some 165 of the country's 200 towers. At that time, these CAA towers were controlling an average of 1,411,650 landings and take-offs per month, totalling over 16,939,800 per year. *CAA Statistical Handbook on Civil Aviation*, p. 21 (G.P.O., 1953). In 1949 there were in excess of 165,000 or an average of 450 per day at the Washington National Airport alone. *Ibid.*, p. 14. CAA also informs us that during the busiest periods there have been 59 landings or take-offs per hour at the National Airport, and it is to be noted that it takes almost a full minute for a plane to move onto a runway, to accelerate and to take-off, and about the same time for a landing plane from the time it touches the ground until it leaves the runway. *CAA Staff Study: Washington Air Traffic Forecast*, pp. 41, 45 (Nov. 1950). The National Airport is the third or fourth busiest airport in the country. At the more congested airports the number of take-offs and landings during peak hours is even higher.

⁵² 14 Fed. Reg. p. 3335-3349, §§ 26.50-61 to 26.50-70; cf. 14 C.F.R. 617.21 to 617.30; *Digest, supra*, pp. 21-22.

⁵³ Planes flying VFR need no prior clearance to enter a control zone (unless specified minimum weather conditions do not exist). But planes flying IFR may not enter without authorization from the tower. Cf. 14 Fed. Reg. p. 3338, § 26.50-62 (g)(1).

⁵⁴ 14 C.F.R. § 60.18(b).

⁵⁵ 14 C.F.R. § 60.19; cf. *id.*, § 60.21.

ing vehicles and personnel on the ground, are watched by the tower traffic controllers.⁵⁶ The Regulations of the Administrator set forth standard procedures for the operation of all control towers, specifying, among other matters, the positions where aircraft should normally be given clearances to land, to take-off, to taxi or to park,⁵⁷ the procedures for determining the runway to use⁵⁸ and for effecting separation of planes in the traffic pattern,⁵⁹ the radio techniques to be employed,⁶⁰ a standard lexicon and phraseology to be used,⁶¹ and the nature of the information to be given pilots concerning traffic and field and weather conditions.⁶²

In short, as the opinion below correctly observed (I 39A), pursuant to congressional mandate, exhaustive and complete air traffic rules, which have nationwide force and application, governing all aspects of air traffic operation and control, have been promulgated. Cf. *United States v. Causby*, 328 U.S. 256. The substance of the matter is aptly summarized by Mr. Justice Jackson concurring in *Northwest Air Lines v. Minnesota*, 322 U.S. 292, 303:

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally supervised personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection so far as transit is concerned, it

⁵⁶ 14 Fed. Reg. p. 3336, § 26.50-62(a).

⁵⁷ *Ibid.*, § 26.50-62(b).

⁵⁸ *Ibid.*, § 26.50-62(c).

⁵⁹ *Ibid.*, p. 3337, § 26.50-62(c).

⁶⁰ *Ibid.*, p. 3345, § 26.50-70.

⁶¹ *Ibid.*, pp. 3339-3344, § 26.50-64.

⁶² *Ibid.*, p. 3344, §§ 26.50-66, 26.50-67; *id.*, p. 3348, § 26.50-70(h)(4).

owes to the Federal Government alone and not to any state government.

(b) The control tower is the starting and the terminal point of this extensive network of regulation and control of air commerce. Its function is regulation in the most direct manner provided under the 1938 Act. The directions which the tower operator gives to aircraft carry the binding authority of law. When he affirmatively instructs planes—as distinguished from giving a clearance, which is only *permissive* in nature⁶³—to enter or leave a traffic pattern, or to ascend or descend to a particular altitude, or to make a right or left turn, etc., his instructions must be obeyed.⁶⁴ The failure or refusal to obey may result in punitive and remedial sanctions such as monetary civil penalties, suspension or revocation of a pilot's certificate, etc.⁶⁵ In that sense, his directions are of the same legal quality as the regulations themselves.

Since no private person has this characteristically governmental power of regulation and control, since no private business undertakes this service for the benefit of interstate air commerce and the community at large—indeed, since any unauthorized interference with air navigation by a private individual is expressly forbidden and is punishable as a felony by fine and imprisonment (49 U.S.C. 622(c))—there can be no parallel liability of a private person “under like circumstances.” Therefore, as in *Feres* and as in *Dalehite*, the negligent acts complained of are not suable under the Tort Claims Act.

3. *Non-CAA towers and appellee's tower cases.*—To avoid the force of this argument, appellee, in its brief below, pointed first to the fact that there are some control towers which are not operated by federal employees, and second, to two cases which appellee asserts have held that the United States may be liable for negligence in the con-

⁶³ See *infra*, p. 46.

⁶⁴ 14 C.F.R. §§ 60.19, 60.21, 60.10. Only in emergency situations which require immediate decision and action may the pilot deviate from an instruction by the tower or from the prescribed Air Traffic Rules. 14 C.F.R. §§ 60.2, 60.21.

⁶⁵ See 49 U.S.C. 559, 560(a)(5), 621; see also, E. Duval, *The Enforcement of Safety Regulations by the CAA*, 35 Calif. L. Rev. 280 (1947).

trol tower. Both factors, we submit, are without substance, and it should be noted that neither was relied upon by the trial judge.

(a) Many airfields do not have traffic control towers. At such terminals pilots land, take-off and space themselves by visual reference in accordance with the applicable air traffic regulations. The construction of towers, as we have already noted (*supra*, fn. 51, pp. 27-8), was necessitated by the hazardous conditions resulting from the heavy congestion at the busier airports. Originally, towers were built by municipalities and the military and were manned by their own personnel. To assure standardization of operating techniques and procedures in the regulation of air traffic, the CAA itself, from 1941 on, began to construct, maintain and operate towers and during the succeeding years its operation became increasingly exclusive. *Ibid.* There are still a number of towers which have not been taken over by CAA personnel but this is only because of Congress' restriction of CAA's budget or because of the small amount of public traffic at the airfields involved.⁶⁶ Significantly, however, the controllers in these towers—if they control civil aircraft in air commerce—must be certificated by CAA (49 U.S.C. 560(a)(2))⁶⁷; the towers are subject to CAA in-

⁶⁶ These include towers located at private airfields operated by aircraft manufacturing companies and flight training schools. In determining whether funds should be given to CAA to construct and operate a tower at a particular airfield, or whether certain towers should be deactivated, the Appropriations Committees of the Congress, in cooperation with CAA, apply a point system to measure the traffic density at the airfields in question. The Appropriations Committees have refused to recommend funds for CAA construction or operation of a tower when the airfield does not attain a stated minimum of traffic points. But even when the minimum is attained or exceeded, the Committees, for reasons of economy, have sometimes withheld appropriations. However, when funds are voted for this purpose, priority is given to those fields whose traffic point total is highest. See, e.g., *Hearings before the Subcommittee of the Committee on Appropriations*, U. S. Sen., 80th Cong., 1st Sess., on H.R. 3311, pp. 971, 975-976; *Hearings before the Subcommittee of the Committee on Appropriations*, H. of Reps., 80th Cong., 2d Sess., on the *Dept. of Commerce Appropriation Bill for 1949*, pp. 223-227; S. Rep. No. 343, 80th Cong., 1st Sess., p. 6; S. Rep. No. 435, 81st Cong., 1st Sess., p. 7.

⁶⁷ 49 U.S.C. 401(6) includes within its definition of an airman "any individual who serves in the capacity of * * * air-traffic-control-tower operator." And 49 U.S.C. 560(a)(2) prohibits any person from serving as an airman in any capacity without an appropriate certificate to so serve. To be eligible for a control tower operator certificate an applicant must meet physical, experience and other qualifications and must pass an examination on the subject of air traffic control. 14 C.F.R. Part 26.

spection (49 U.S.C. 556)⁶⁸; and the procedures and techniques which must be employed are those set forth in the Regulations of the Administrator of Civil Aeronautics (14 Fed. Reg., p. 3328, § 26.50-2(a); 14 C.F.R. § 617.3). This delegation of authority to others to supervise and regulate air traffic at some sites does not detract from the fact that the regulatory activity involved is governmental any more than the existence of privately employed special police alters the essentially governmental character of their function of preserving the peace.⁶⁹

(b) The two tower cases principally relied on by appellee below were *Marino v. United States*, 84 F. Supp. 721 (E.D.N.Y.) and *United States v. Douglas Aircraft Co.*, 169 F. 2d 755 (C.A. 9). In *Marino* an Army plane taxiing to a hangar on a military airfield struck and injured the operator of a tractor repairing the field. In an action under the Tort Act the district court held the Government liable for the tower's negligence in permitting the plane to proceed before clearing the taxiway. The case did not involve the regulation of civil aircraft in commerce (which is the subject of the Civil Aeronautics Act and the source of the duties held to have been breached below). It involved an U. S.-owned plane, on land, at an exclusively military airfield whose tower was operated by military personnel, and the person injured was a civilian employee of a firm which had contracted with the Army to repair the field. None of the points which we raise in the instant case was presented to or discussed by the district judge and his decision was

⁶⁸ A certificated controller is prohibited from controlling air traffic with facilities which the CAA has determined to be inadequate. 14 C.F.R. 26.31.

⁶⁹ It would seem that the traffic controller in these non-CAA towers is analogous to a special policeman. As such he acts in a dual capacity of public officer and private employee. It is well settled that special policemen, licensed by state authority, but employed by a private company, are public officers deriving their authority from the state and, when performing public functions, they are subject to the same rules as apply to public police. *Labor Board v. Jones & Laughlin Co.*, 331 U.S. 416, 429; *Dempsey v. N.Y.C. & H.R.R. Co.*, 146 N.Y. 290, 40 N.E. 867; *Thornton v. Missouri P. R. Co.*, 42 Mo. App. 58; *New York, C. & St. L. R. Co. v. Fieback*, 87 Ohio St. 254, 100 N.E. 889; *Neallus v. Hutchinson Amusement Co.*, 126 Me. 469, 139 A. 671. For that reason the employer is not liable for the wrongful acts of a special policeman when such acts are done in his capacity as a public officer as distinct from acts performed primarily as a servant. *McKain v. B. & O. R. Co.*, 65 W. Va. 233, 64 S.E. 18; and see cases in *Note*, 23 LRA (N.S.) 289.

not reviewed by an appellate court. The case is entirely inapposite as a controlling precedent in the proceedings at bar.

The *Douglas* case is even less appropriate for it was an action brought by the United States and in no way involved the Tort Claims Act. The United States sued Douglas for damages to a government owned plane which, while parked on a runway and waiting to be towed to a parking area at a municipal airport, was struck by Douglas' plane taxiing into the same runway. The Government alleged that Douglas was negligent, and Douglas contended that the Government was contributorily negligent in parking the plane where it did and in the tower's failure to remove or warn of the government plane. The Court of Appeals, affirming a jury verdict for Douglas, held that the questions of negligence and contributory negligence were questions of fact to be settled by the jury. In discussing the evidence which might sustain the jury's finding of contributory negligence, the Court remarked that the operation of the tower might constitute such negligence (169 F. 2d 758). The distinguishing feature of the case is obvious: it is one thing to assert the negligence of a CAA tower as a shield to defeat recovery in a suit brought by the United States, but it is quite another to say that such negligence may give rise to an action for affirmative recovery against the United States. Even before the enactment of the Tort Claims Act when the Government could not be sued for its negligence, its contributory negligence constituted a complete bar in an action brought by the United States. *United States v. Moscow-Idaho Seed Co.*, 92 F. 2d 170 (C.A. 9). The *Douglas* case goes no further. Compare, *Georger, Admx. v. United States*, 1949 U. S. App. R. 113 (E.D. Va.); and see *Finfera v. Thomas*, 119 F. 2d 28 (C.A. 6).

C. *The Claims Are Barred By the Discretionary Function Exception of the Tort Claims Act.*

In the court below, appellee also relied upon a number of cases which have held a municipality liable for a collision between a landing plane and some obstruction at its air-

port; there, liability was based on the ground that the proprietor of an airport, like any occupant of land, owes a duty to a business invitee to provide reasonably safe premises. But whatever "housekeeping" duties the Government may have as owner of the Washington National Airport, the control of air traffic through scores of CAA operated towers is a function separate and distinct.⁷⁰ The trial judge recognized this and rested liability squarely on the negligent regulation of air traffic. The regulation of air traffic, however, is a discretionary function and is fully within the coverage of the Tort Act's exception, 28 U.S.C. 2680(a).

Perhaps the closest analogy to the situation at bar is the function of a city or state in regulating and controlling traffic on the highways.⁷¹ But the only liability assumed by the United States under the Tort Act is that of a "*private individual*" (28 U.S.C. 2674) or "*private person*" (28 U.S.C. 1346(b)). These words leave little room for measuring such liability by that of a municipality or state or any other entity exercising governmental authority. Nevertheless, even if we indulge in the comparison and ignore the significant adjective "private," treating "*private individual*" as including a city or state (see *Feres*, 340 U.S. at 142), the comparison requires the same conclusion of no liability.

The words "discretionary function" express a "concept of substantial historical ancestry in American law" (*Dalehite*, 346 U.S. at 34). Their meaning⁷² was developed

⁷⁰ The distinction is emphasized by the *Dalehite* dissent. It is important to observe that both the majority and the dissenters were in agreement that the Tort Act bars claims based upon the regulatory activities of the Government. The dissent, however, would have imposed liability when, "The Government, as landowner * * * is carrying on activities indistinguishable from those performed by private persons," but not when "an official exerts governmental authority in a manner which legally binds one or many," for then "he is acting in a way in which no private person could." 346 U.S. at 60, 59. The function of the tower operator falls within the latter category, the operation of the airport within the former. Thus, under both the majority and the dissenting opinions, the decision below is in error.

⁷¹ In explaining the functions of the control tower operator, several of the witnesses during trial likened the tower operator to a policeman directing auto traffic at a highway intersection (II 273-4A, VII 1353A). Appellee's counsel drew the same analogy (IV 862A).

⁷² Since this is a question of construing a federal statute, the federal law, rather than the law of the District of Columbia or of Virginia, controls.

through the years in cases involving (a) suits against municipalities and states for injuries resulting from the performance of certain discretionary functions,⁷³ (b) damage suits against public officials for carrying out official discretionary duties,⁷⁴ and (c) mandamus or injunction actions to compel the performance of discretionary duties.⁷⁵ The controlling principle to be drawn from these three bodies of law is that it is not the place of the courts to revise, supervise or control executive conduct involving the exercise of judgment, choice or discretion of a public character. This principle, which is embodied in the Tort Claims Act in Section 2680(a) and which was touched on only in a most obscure manner by the judge below, has direct application to the activities of the control tower personnel and precludes any judicial evaluation of their conduct in this case. See *Georger, Admx. v. United States*, 1949 U.S. Av. R. 113, 114 (E. D. Va.). Throughout the years the courts have held that neither a municipality nor its officer is answerable in a suit for damages by a private person for the negligent performance of their regulatory duties relating to the protection of life and property. These functions, specifically the regulation of traffic, are governmental and discretionary. The duties involved are owed to the public at large rather than to any particular individual. The functions and duties of the control tower operator are of this nature.⁷⁶

⁷³ E.g., *Johnston v. District of Columbia*, 118 U.S. 19, 21; *Barrett v. State of New York*, 220 N.Y. 423, 116 N.E. 99; *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E. 2d 704.

⁷⁴ E.g., *Spaulding v. Vilas*, 161 U.S. 483, 498-499; *Gregoire v. Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949; *Brown v. Rudolph*, 58 App. D.C. 116, 25 F. 2d 540, certiorari denied, 227 U.S. 605.

⁷⁵ E.g., *Louisiana v. McAdoo*, 234 U.S. 627, 633; *Wilbur v. United States*, 281 U.S. 206, 219-220.

⁷⁶ The distinction we make is not between the "governmental" and "proprietary" functions of a municipal corporation, but, if a comparison is to be made, between its "discretionary" and its "ministerial" functions. Though sometimes confused, these two sets of opposites are separate and distinct and rest on different bases. In some states, the rule of non-liability for "discretionary" functions of municipalities originally developed, in part, as an offshoot of the court's application of the state's sovereign immunity from suit to non-"proprietary" functions of the city, as a governmental arm of the state. But as it has developed throughout the country, the rule of non-liability for "discretionary" functions has broken away from dependence on the state's immunity from suit, as well as from the governmental-pro-

1. *Section 2680(a) precludes liability for negligence in the performance of a regulatory function.*—Decisions in suits against states and municipalities have long characterized many municipal and state functions as “governmental” or “discretionary,” and where that is the conclusion liability is invariably rejected. Where the duties of the municipal authorities involve the exercise of deliberate judgment and discretion and depend “upon considerations affecting the public health and general convenience throughout an extensive territory,” “the exercise of such judgment and discretion * * * is not subject to revision by a court or jury in a private action” (*Johnston v. District of Columbia*, 118 U.S. 19, 20-21). See *supra*, pp. 22-3.

The principle has universal application with respect to the police powers. If one thing is settled in the American law of governmental liability, it is that the negligent performance of, or the negligent failure to perform, governmental duties of regulation and control gives rise to no actionable private claim. The enactment and the enforcement of laws and ordinances intended to secure the safety, health, and well-being of the community are functions and duties *qua* government; in fact, these are the very kind of functions for which a state exists. The appropriate officers are endowed with power to select the ways and means for performing these functions, and significant elements in the exercise of their judgment are public considerations different from those weighed by private persons. Accordingly, these functions are traditionally and universally regarded as “governmental” or “discretionary.” *Dalehite*, 346 U.S. at 43; *Weightman v. The Corporation of Washington*, 1 Black 39, 49.

prietary distinction, and now rests firmly on the judgment that it is unwise, in the absence of specific legislation, to hold municipalities liable to respond in damages to private persons for acts or omissions connected with functions truly involving governmental discretion or judgment. That this is now the foundation of the rule is shown by the course of decisions in the State of New York which has long had a statute subjecting the state to suit in tort. See *Barrett v. State of New York*, 220 N.Y. 423, 116 N.E. 99; *Paige v. State of New York*, 269 N.Y. 352, 199 N.E. 617; *Goldstein v. New York*, 281 N.Y. 396, 24 N.E. 2d 97; *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E. 2d 704; *Murray v. Wilson Line*, 270 App. Div. 372, 59 N.Y.S. 2d 750 affirmed, 296 N.Y. 845, 72 N.E. 2d 29; *Newiadony v. State*, 276 App. Div. 59, 93 N.Y.S. 2d 24.

Whether or not a governing body will undertake to regulate and control transportation—or any other activity—is entirely discretionary. If it does undertake such regulation and control, the extent of the undertaking and the form which it takes are equally discretionary. Thus, a city or state cannot be held for failure to enact control laws or ordinances which would have prevented injury if they had been passed and enforced.⁷⁷ Negligence in the failure to prevent injury through lack of regulation is “classically within the exception” of the Tort Act; “The courts have traditionally refused to question the judgments on which they are based.” *Dalehite, supra*, at 346 U.S. at 43.

For the same reason, it is regularly held that a governing body is not liable for the failure to enforce regulatory or control laws or ordinances which have been enacted.⁷⁸

Finally, the negligent doing, or the misdoing, by officials of a government, of regulatory acts imposes no liability

⁷⁷ See, e.g., *Gutowski v. Mayor, etc., of City of Baltimore*, 127 Md. 502, 96 A. 630 (failure to set up inspection system which might have prevented explosion in Baltimore harbor); *Zywicki v. Jos. R. Foard Co.*, 206 Fed. 975 (D. Md.) (the same); *State v. General Stevedoring Co.*, 213 Fed. 51 (D. Md.), aff'd, 219 Fed. 827 (C.A. 4) (the same); *Mayne v. Curtis*, 73 Ind. App. 640, 126 N.E. 699 (failure to require bumper or derail at end of locomotive track); *Curran v. Chicago Gt. Western Ry. Co.*, 134 Minn. 392, 159 N.W. 955 (failure to require railroad gate crossings); *McGuinness v. Allison Realty Co.*, 46 Misc. 8, 93 N.Y.S. 267, affirmed, 111 App. Div. 926 (failure to enact proper building code); *Smith v. Borough of Selinsgrove*, 199 Pa. 615 49 A. 213 (failure to prohibit dogs running at large); *Kelley v. City of Milwaukee*, 18 Wis. 83 (same for hogs); *Marth v. City of Kingfisher*, 22 Okla. 602 98 P. 436 (same for horse racing on streets); *Kistner v. Indianapolis*, 100 Ind. 210 (failure to regulate railway running on street); *James v. City of Harrodsburg*, 85 Ky. 191, 3 S.W. 135 (failure to adopt ordinance on blasting).

⁷⁸ See, e.g., *Restatement of Torts*, Sec. 288; *Young v. State*, 278 App. Div. 997, 105 N.Y.S. 2d 657, affirmed, 304 N.Y. 677, 107 N.E. 2d 594 (failure to inspect bridge scaffolding); *Keibert v. Board of Wilson County Com'rs*, 134 Kans. 401, 5 P. 2d 1085 (failure to appoint plumbing inspector); *Rusk v. Montgomery*, 80 Ore. 93, 156 P. 435 (failure to supervise maintenance of wharf); *Kretchmar v. City of Atchison*, 133 Kans. 198, 299 P. 621 (failure to enforce anti-firecracker ordinance); *Remy v. City of Shenandoah*, 184 Iowa 1370, 169 N.W. 737 (same); *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16 (failure to enforce ordinance requiring license for blasting); *Hines v. City of Charlotte*, 72 Mich. 278, 40 N.W. 333 (failure to enforce zoning ordinance); *Harman v. City of St. Louis*, 137 Mo. 494, 38 S.W. 1102 (same); *Ryan v. Kansas City*, 232 Mo. 471, 134 S.W. 566 (failure to enforce ordinance requiring lights and barriers around excavations); *City of Knoxville v. Hargis*, 184 Tenn. 262, 198 S.W. 2d 555 (failure to enforce awning height ordinance); *Addington v. Town of Littleton*, 50 Colo. 623, 115 P. 896; *Town of Gainesboro v. Gore*, 131 Tenn. 35, 173 S.W. 442; *Everly v. City of Gas*, 95 Kans. 305, 147 P. 1134 (all involving animals running at large contrary to ordinance); *City of Mansfield v. Bristol*, 76 Ohio St. 270, 81 N.E. 631 (anti-sewage dumping ordinance); *Veraguth v. City of Denver*, 19 Colo. App. 473, 76 P. 539 (ordinance against dumping ashes in unsafe place).

upon the governing body. The manner of performance is discretionary.⁷⁹

These principles apply specifically with regard to highway and traffic control. Just as the municipality is not liable for the failure of its police to provide adequate protection of life and property in other respects,⁸⁰ so there is no liability for injuries flowing from its failure to adopt or to properly enforce traffic regulations. The cases are numerous. There is, for instance, no liability for negligence in the enforcement of a one way street ordinance⁸¹ or a parking ordinance,⁸² for failure to prevent automobile or horse racing on the streets,⁸³ for failure to stop bicycle riding on the streets,⁸⁴ for negligent maintenance or failure to erect

⁷⁹ E.g., *Restatement of Torts*, Sec. 288; *Barrett v. State of New York*, 220 N.Y. 423, 116 N.E. 99 (forbidding the killing of, and stocking, wild beavers which injured property); *Bertch v. State*, 193 Misc. 259, 83 N.Y.S. 2d 814 (erroneous impounding of auto driver's license, plates, and registration); *Toyos v. State*, 181 Misc. 761, 47 N.Y.S. 2d 322 (revocation of liquor license); *City of Anderson v. East*, 117 Ind. 126, 19 N.E. 726 (allowing walls of burned building to stand); *Müller v. Clarke*, 47 R.I. 13, 129 A. 606; *Wheeler v. City of Plymouth*, 116 Ind. 158, 18 N.E. 532; *Hill v. City of Charlotte*, 72 N.C. 55 (all involving the licensing or approving of fireworks); *Bagni v. City of Bristol*, 127 Conn. 38, 14 A. 2d 716; *Harris v. City of Des Moines*, 202 Iowa 53, 209 N.W. 454 (both involving the setting aside of streets for sled coasting); *Rivers v. City Council of Augusta*, 65 Ga. 376 (suspending ordinance prohibiting cows running at large).

⁸⁰ E.g., *Murray v. Wilson Line*, 270 App. Div. 372, 59 N.Y.S. 2d 750, aff'd 296 N.Y. 845 (negligence in controlling a crowd); *Schuster v. City of New York*, 121 N.Y.S. 2d 735 (Sup. Ct., Kings Co.) (failure to provide protection to an individual after notice of threats upon his life); *Brogan v. Philadelphia*, 346 Pa. 208, 29 A. 2d 671 (failure to protect a traveller from dangerous conduct of others on a highway); *Savage v. D. of C.*, 52 A. 2d 120 (D.C. Mun. App.) (police broke into and took possession of plaintiff's house and belongings); *Giordana v. City of Asbury Park*, 91 F. 2d 455 (C.A. 3), certiorari denied, 302 U.S. 745, 799 (false arrest); *Borough of Morristown v. Fitzpatrick*, 94 Pa. 121 (failure to halt firing of a cannon in street); *O'Rourke v. Sioux Falls*, 4 S.D. 47, 54 N.W. 1044, 19 L.R.A. 789 (same); *Trower v. City of Louisiana*, 198 Mo. App. 352, 200 S.W. 763 (same); *City of New Orleans v. Abbagnato*, 62 Fed. 240 (C.A. 5) (failure to prevent a lynching); *The Nez Perce Tribe of Indians v. United States*, 95 C. Cls. 1, 9-11, cert. den. 316 U.S. 686 (failure to prevent removal of gold from tribal land); *Turner v. United States*, 51 C. Cls. 125, 153, aff'd, 248 U.S. 354 (failure to prevent destruction of property); cf. *Louisiana v. Mayor of New Orleans*, 109 U.S. 285, 291.

⁸¹ *Doughty v. Phila. Rapid Transit Co.*, 321 Pa. 136, 184 A. 93.

⁸² *White v. Casper*, 335 Wyo. 371, 249 P. 562; *Meanes v. Barnesville*, 28 Ga. App. 671, 112 S.E. 739; *Bradley v. Oskaloosa*, 193 Iowa 1072, 188 N.W. 896.

⁸³ *McCarthy v. Munising*, 136 Mich. 622, 99 N.W. 865; *Rose v. City of Gypsum*, 104 Kan. 402, 179 P. 348.

⁸⁴ *Jones v. Williamsburg*, 97 Va. 722, 34 S.E. 883; *Rogers v. City of Binghamton*, 101 App. Div. 352, 92 N.Y. Supp. 179, aff'd 186 N.Y. 595, 75 N.E. 1115.

stop signs,⁸⁵ for failure to regulate a railway running on a street,⁸⁶ for allowing a street car to operate the wrong way on a one-way street,⁸⁷ for not enforcing regulations prohibiting or limiting vehicles on sidewalks,⁸⁸ etc.

The same rule applies when cities are sued for the negligent misdirection of traffic on the public highways. An automobile case presenting facts analogous to those at bar is *Ferrier v. City of White Plains*, 262 App. Div. 94, 28 N.Y.S. 2d 218, leave to appeal denied, 287 N.Y. 852. There, the city had designated a street on a hill for coasting and had stationed a policeman to regulate and direct traffic at the foot of the hill where another street intersected it. While plaintiff's son was coasting on a sled down the hill, the policeman negligently signalled an auto to proceed across the intersection. The driver, unable to see the sled, obeyed the signal, drove into the intersection, collided with the sled and injured the boy. An action was brought against the city for the negligence of its officer in regulating traffic. The court held that the decision to designate the street for coasting, the decision whether or not to assign one or more policemen to regulate traffic there, and the policeman's acts in directing traffic were the performance of governmental functions and discretionary acts, and that a municipality is not suable for negligence in the performance of such duties.⁸⁹

⁸⁵ *Kirk v. City of Muskogee*, 183 Okla. 536, 83 P. 2d 594; *Tolliver v. Newark*, 145 Ohio St. 517, 62 N.E. 2d 357; *Powell v. Nashville*, 167 Tenn. 334, 69 S.W. 2d 894.

⁸⁶ *Kistner v. Indianapolis*, 100 Ind. 210.

⁸⁷ *Doughty v. Phila. Rapid Transit Co.*, 321 Pa. 136, 184 A. 93.

⁸⁸ *Roberson v. District of Columbia*, 86 A. 2d 536 (D.C. Mun. Ct. of App.); *Tarbutton v. Town of Tenville*, 110 Ga. 90, 35 S.E. 282; *Rogers v. City of Binghamton*, *supra*; *Millett v. City of Princeton*, 167 Ind. 582, 79 N.E. 909; *Jones v. City of Williamsburg*, 97 Va. 722, 34 S.E. 883.

⁸⁹ This decision as well as the other New York cases we rely upon elsewhere in this brief, such as *Steitz v. City of Beacon*, 295 N.Y. 51 (negligent fire protection); *Murray v. Wilson Line*, 270 App. Div. 372, affirmed, 296 N.Y. 845 (negligent police protection); *Young v. State*, 278 App. Div. 997, affirmed, 304 N.Y. 677 (negligent inspection of scaffolding); *Meadows v. Mineola*, 190 Misc. 817 (negligent enforcement of building code); etc., are of especial significance because they arise under a New York statute (L. 1939, ch. 860, sec. 8) which waives the State's sovereign immunity in much broader terms than does the federal Tort Claims Act. It contains no discretionary function exception analogous to 28 U.S.C. 2680(a). Nevertheless, even without such an express exception, the New York courts hold that the State and its cities

The same reasoning and result as were expressed in the *Ferrier* case, *supra*, follow where, instead of a policeman, an automatic traffic light is placed at a corner to regulate traffic. Cities have frequently been sued because of a collision caused by its negligent maintenance of such signals—*i.e.*, lights in both directions showing green at the same time, or one side green and the other failing to show red. Here, too, by the overwhelming weight of authority, the city is held free of liability because the activity involved is the exercise of the police power, a governmental function. See *e.g.*, *Dorminey v. Montgomery*, 232 Ala. 47, 166 So. 689; *Avey v. West Palm Beach*, 152 Fla. 717, 12 So. 2d 881; *Sandman v. Sheehan*, 279 Ky. 614, 131 S.W. 2d 484; *Auslander v. St. Louis*, 332 Mo. 145, 56 S.W. 2d 778; *Vickers v. Camden*, 122 N.J.L. 14, 3 A. 2d 613; *Kirk v. City of Muskogee*, 183 Okla. 536, 83 P. 2d 594; *Martin v. Canton*, 41 Ohio App. 420, 180 N.E. 78; *Baker v. Waco*, 129 S.W. 2d 499 (Tex. Civ. App.).⁹⁰

The basis for the rule is stated in *Dorminey v. Montgomery*, *supra*, the leading case:

Traffic signal lights serve the purpose, and were so designed, to regulate the use of the streets where installed. There is no duty enjoined by statute upon a

cannot be held liable for the negligent performance of a governmental or discretionary function. *E.g.*, *Ibid*; *Barrett v. State of New York*, 220 N.Y. 423, 430-431, 116 N.E. 99; *Goldstein v. State of New York*, 281 N.Y. 396, 405, 406, 24 N.E. 2d 97.

⁹⁰ *Foley v. State of New York*, 294 N.Y. 275, 62 N.E. 2d 69, cited by the court below, is one of the very few cases to the contrary. There, liability was imposed upon the State for the negligent maintenance of a traffic signal on the ground that the statute created a *mandatory* duty to maintain the signal. In the instant case, there is no mandatory duty to maintain control towers. Thus, 49 U.S.C. 452(a) provides that, "The Administrator is *authorized*, within the limits of available appropriations made by Congress," to acquire and operate navigation facilities. In *Steitz v. City of Beacon*, 295 N.Y. 51, 56, 64 N.E. 2d 704, the New York court emphasized that the *Foley* decision rested on the legislative intent to protect the personal interests of particular individuals. In *Steitz*, where the statute was not mandatory, the city was empowered to maintain a fire department and to operate a system of waterworks for fire protection. The negligent failure to do so was held not actionable by a private person who suffered fire damage, because the statute was not designed "to protect the personal interest of any individual" except as they were "members of the community" (295 N.Y. 55). The *Steitz* case was cited in *Dalehite* in holding the Government immune for negligence of the Coast Guard. We believe it is equally applicable here.

municipality to install such signals and, if installed, it is done in the exercise of a discretionary power, possessed by the municipality to conserve the safety of the public using such streets * * *. * * *

[T]he city, in installing the signal lights to warn and direct the traveling public, was exercising a governmental function, under its police power, and this being true * * * was not answerable in damages to the plaintiff for any failure of the city, its agents, employees, or officers in permitting the traffic light to be or to remain out of repair.⁹¹

2. *The traffic controller's duty to regulate traffic properly is a duty to the public; breach of that duty does not create private rights.*—Another basis for the result reached in these cases, equally potent to defeat liability in the instant actions, is that the obligation involved is one which is owed to the public in general and not to particular individuals. Many statutes, especially regulatory measures, create uniform standards of conduct which must be complied with or duties which must be met by private persons. Breach of such statutory duties by a private person and the consequent injury to those intended to be protected will generally result in an actionable cause.⁹² But the violation of a statutory duty imposed on a public officer by the very same enactment—through his negligent execution or enforcement of the measure—poses a distinct problem. For, relatively few statutes are self executing; almost all impose duties upon

⁹¹ See also *Clain v. City of Burlington*, 202 F. 2d 532, 534 (C.A. 2) where the court, per L. Hand, C.J., in holding a city not liable for the negligent failure to light up a "silent policemen" at night, stated that making a highway safe for travel is an exercise of a "governmental power."

⁹² E.g., *Texas and Pac. R. Co. v. Rigsby*, 241 U.S. 33. But even here, the initial test is to determine whether the "statute gives a cause of action to a person injured by its violation, or whether it is intended as a general police regulation, and the violation made punishable solely as a public offense." *Amberg v. Kinley*, 214 N.Y. 531, 535-6, 108 N.E. 830 [emphasis ours]. "The nature of the duty * * * and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty wholly or in part for their special benefit." *Hayes v. Michigan Central R.R. Co.*, 111 U.S. 228, 240. For example, a municipal ordinance requiring property owners to remove ice from sidewalks is generally held to create a duty to the public rather than to private individuals. *Taylor v. Lake Shore & Mich. S. Ry.*, 45 Mich. 74, 7 N.W. 728; *Restatement of Torts*, § 288, Comment a.

public officials, either with regard to execution or enforcement of the law. Such duties are public in nature and their violation normally does not create private rights. Cf. *South v. State of Maryland*, 18 How. 396, 402.

It is fundamental of course that there can be no liability for negligence unless there has been a breach of duty owed to the person injured. Repeatedly the courts have stressed that the protection of life and property are obligations which the governing body owes to the community as a whole;⁹³ that, in the absence of the expression of an unmistakable contrary purpose, statutes and ordinances which undertake through governmental action and through regulatory measures to secure these benefits, "do not import intention to protect the interest of any individual except as they secure to all members of the community the enjoyment of rights and privileges to which they are entitled only as members of the public." *Murray v. Wilson Line*, 270 App. Div. 372, 377, 59 N.Y.S. 2d 750, affirmed, 296 N.Y.S. 845, 72 N.E. 2d 29; *Steitz v. City of Beacon*, 295 N.Y. 51, 56, 64 N.E. 2d 704. Where such statutes impose specific duties upon a public official, these duties are owed to the public in general rather than to any particular member of the public. The failure to perform, or the negligent performance of such duties is regarded as a public injury, not a private wrong; a breach of public duty may be punished by some form of public prosecution, but not by way of a civil action by those who have suffered damage in consequence of the default in duty. *South v. Maryland*, *supra*.⁹⁴

This basis for immunity has been applied where there has been damage or injury as a result of negligence in failing to provide adequate police protection,⁹⁵ fire protection,⁹⁶

⁹³ See *infra*, fn. 94, and p. 43, fn. 97.

⁹⁴ Cf. *Miller v. Ouray E. L. & P. Co.*, 18 Colo. App. 131, 70 Pac. 447 (failure to inspect jail; death to prisoner through fire); *Boston Ins. Co. v. Chicago etc. Ry.*, 118 Iowa 423, 92 N.W. 88, 91 (failure to carry mail safely; loss of plaintiff's package); *McPhee v. U.S.F. & G. Co.*, 52 Wash. 154, 100 Pac. 174 (permitting a prisoner to escape; plaintiff deprived of reward); *Strong v. Campbell*, 11 Barb. (N.Y.) 135 (failure to insert public advertisement; loss of revenue to newspaper); *People v. Hoag*, 54 Colo. 542, 131 Pac. 400 (same). See also *Molloy v. City of New Rochelle*, 198 N.Y. 402, 407-8, 92 N.E. 94.

⁹⁵ *South v. State of Maryland*, *supra*; *Murray v. Wilson Line*, *supra*; *Amala v. McLeod*, 122 Mont. 498, 206 P. 2d 811.

⁹⁶ *Steitz v. City of Beacon*, *supra*.

and in other respects relating to safety and health.⁹⁷ The principle has been adopted and applied in cases under the Tort Act. *National Manufacturing Co. et al. v. United States*, — F.2d — (C.A. 8, decided Feb. 8, 1954) (negligence of Weather Bureau does not create private rights);⁹⁸ *Clark v. United States*, 109 F. Supp. 213 (D. Ore.) (negligence of Army in maintaining dikes); *Lacey v. United States*, 98 F. Supp. 219, 220 (D. Mass.) (negligence of Coast Guard in effecting a rescue); and see, *The P. Dougherty Co. v. United States*, 207 F. 2d 626 (C.A. 3), certiorari denied, 22 U. S. Law Week 3209 (same, under the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781 *et seq.*).

If this were not the rule, the governing body would in effect be a guarantor of the perfect enforcement of its laws, and negligence in the performance of its governmental duties relating to the safety, health or welfare of the community would be actionable by anyone injured. "An intention to impose * * * the crushing burden of such an obligation should not be imputed to the Legislature in the absence of language clearly designed to have that effect." *Steitz v. City of Beacon*, *supra*, 295 N.Y. at 55. Cf. *Routh v. Quinn*, 20 Cal. 2d 488, 127 P. 2d 1, 3; *Young v. State*, *supra*.⁹⁹

The opinion below purports to find just such a legislative purpose behind the Civil Aeronautics Act although no particular language of the Act is relied upon as supporting this radical departure from the settled principle that negligence in the administration of law gives rise to no private cause of action. The Civil Aeronautics Act does, of course, have as one of its primary objects the promotion of safety in air commerce (see, 49 U.S.C. 402). But the broad scheme

⁹⁷ See, *United States v. Price*, 95 F. 2d 687 (C.A. 5), certiorari denied, 305 U.S. 601 (negligent inspection of infected animals); *Young v. State*, 278 App. Div. 997, 105 N.Y.S. 2d 657, affirmed, 304 N.Y. 677, 107 N.E. 2d 594 (negligent inspection of scaffolding); *Meadows v. Mineola*, 190 Misc. 817, 75 N.Y.S. 2d 908 (negligent enforcement of building code); and see cases cited in fn. 78, p. 37, *supra*.

⁹⁸ See also the District Court opinion, *sub nom. Mid Central Fish Co. v. United States*, 112 F. Supp. 792, 797 (W.D. Mo.).

⁹⁹ The fundamental obstacle to recovery in such situations, quite apart from the immunity of the sovereign from suit, is the lack of a substantive right to recover the damages resulting from the failure of the public official to perform his duty carefully; in short, there can be no recovery unless the act clearly indicates a purpose to create a new substantive right. *Turner v. United States*, 248 U.S. 354, 357-358.

of accomplishing this important purpose is by promulgating and enforcing policies fostering safety; aircraft, air carriers and airmen are made the subject of intensive regulation; the flying equipment, the qualifications of the fliers and their conduct in flight must conform to standards laid down by the authorities. The basic aim is not to surcharge the Government with duties and obligations to individual members of the public, but to create and enforce minimum and uniform operating standards of airmen and aircraft for the benefit of the whole country. The Act does not single out federal employees and fix penalties for their violation of duties; rather, the rules of conduct and the penalties for their violation are addressed to those who are the subject of the regulation.

The court below has inverted the emphasis of the Act, and has made the conduct of the administrators answerable to a private suit for damages. If that decision is to stand then by parity of reasoning it would seem to follow that the Government would also be suable if, through negligence, an incompetent pilot were licensed, or a lax standard of equipment inspection were adopted, or an insufficient number of operators were assigned to a control tower. But the obligation of properly performing regulatory and discretionary duties of this kind has always been regarded as an obligation to the public at large. The Civil Aeronautics Act does not depart from this settled principle. It was largely modeled upon the Interstate Commerce Act and the Motor Carrier's Act¹⁰⁰ and, so far as we know, neither of these Acts has ever been construed as creating private actionable rights for breach of the regulatory duties imposed on the public officials. That there was no legislative intention to confer such rights is emphasized further by the fact that the Civil Aeronautics Act was passed many years before Congress, through enactment of the Tort Claims Act, permitted suit for tort.

3. *Appellee's claims against the United States are based upon acts which involve the exercise of judgment and dis-*

¹⁰⁰ See, F. A. Ballard, *Federal Regulation of Aviation*, 60 Harv. L. Rev. 1235, 1257 (1947).

cretion.—In discussing the nature of the “discretion” which is protected by the discretionary function exception of the Tort Claims Act, 28 U.S.C. 2680(a), the *Dalchite* decision declares (346 U.S. at 34) that it is not the discretion of a judge, *i.e.*, “a power to decide within the limits of positive rules of law subject to judicial review.” Unquestionably, such judicial discretion is excluded from the Act (*Cromelin v. United States*, 177 F.2d 275 (C.A. 5), certiorari denied, 339 U.S. 944). Rather, “It is the discretion of the executive or the administrator to act according to one’s judgment of the best course” (346 U.S. at 34).¹⁰¹

The acts of the tower operators, which the court below said concurred in the negligence of Eastern Air Lines in causing the accident, fall precisely within this holding. Cf. *Georger, Admx. v. United States*, 1949 U.S. Av. R. 113, 114 (E.D. Va.).¹⁰² The district court rested the Government’s liability upon the failure of the tower to inform each plane of the activities of the other and in clearing both for landing at approximately the same time. But the nature of the detailed traffic information which the tower issues to a pilot as well as the timing and sequence of landing clearances are matters which are subject to the judgment and discretion of the traffic controller. As to the issuance of traffic information, the regulations expressly provide:

¹⁰¹ Cases which illustrate appropriate application of the discretionary function exception are discussed briefly in the *Dalchite* decision at 346 U.S. 36-37, fn. 32. Included among these approved cases is *Olson v. United States*, 93 F. Supp. 150 (D. N. D.) (claimant sought damages resulting from the release of waters of a dam; liability denied: “when flood waters are to be released and how much water is to be released calls for the exercise of judgment”). As to cases decided after *Dalchite*, see *Smart v. United States*, 207 F. 2d 841, 842-3 (C.A. 10) (Discretionary function exception bars relief for negligently releasing a mental patient from a Government hospital for a trial visit: “Whether such visits shall be permitted * * * of necessity involves the exercise of judgment and discretion. * * * Whether the patient could be safely released and permitted to go on his way without an attendant likewise involved the exercise of discretion”); *Harris v. United States*, 205 F. 2d 765 (C.A. 10) (Discretionary function exception bars liability for damages resulting from airplane spraying while eradicating mosquitoes); *National Manufacturing Co. v. United States*, — F. 2d — (C.A. 8, Feb. 8, 1954) (the exception bars claims based upon informational services of the U.S. Weather Bureau).

¹⁰² In the *Georger* case, a plane struck a mountain after having received a tower clearance to descend to a lower altitude. The court held that the exception barred suit, “that the activities of the control officer were those imposed by statute or regulation and that it was an exercise of judgment and as such exempts the United States from an error in that judgment.”

Detailed essential local traffic information shall be issued when, *in the judgment of the controller*, such information is necessary in the interests of safety, or when requested by a pilot. [Emphasis ours.]¹⁰³

Here, there is no evidence that either pilot requested any detailed traffic information. On the other hand, the evidence is clear that the tower did apprise each plane of the presence of the other in traffic as soon as—even before—the tower operator, in his judgment, believed there was a collision hazard.¹⁰⁴

As to landing clearances, these are merely “permissive in nature” (14 Fed. Reg. p. 3341, § 26.50-65), and the regulations provide explicitly that, when flying VFR, as these planes were, it is the direct responsibility of the *pilot* to avoid collision with other aircraft, that the information and clearances of the control tower are intended only as an aid to the pilot and not to relieve him of that responsibility.¹⁰⁵ (Contrast the situation when the planes are flying IFR, *i.e.*, by instrument. In that event, and only then, the regulations indicate that the responsibility may shift to the tower.¹⁰⁶)

These regulations were completely ignored by the trial judge.¹⁰⁷ They underscore the discretionary nature of the

¹⁰³ 14 Fed. Reg. p. 3344, § 26.50-66 (b) (1), now in 14 C.F.R. § 617.26 (b).

¹⁰⁴ Bridoux testified that the tower's first transmission to him in flight was that he was number two to land, which he correctly understood to mean that there was a plane in the pattern which would land ahead of him. See *supra*, pp. 10-11, Appellee's own witness Shaw, testified that he heard the tower warn the DC-4 that there was a P-38 in traffic (*supra*, pp. 7-8) and that the warning came about a minute before the collision (*id.*, and see *supra*, p. 9, fn. 13).

¹⁰⁵ 14 Fed. Reg. p. 3344, § 26.50-66 (a); *ibid.*, pp. 3335-3336, § 26.50-61 (b) (1); cf. 14 C.F.R. §§ 617.26 (a) (1) and 617.21 (b) (1).

¹⁰⁶ 14 Fed. Reg. pp. 3335-6, § 26.50-61 (b) (2).

¹⁰⁷ Indeed, one aspect of his charge to the jury indicates that he misconceived the nature of the responsibilities of the pilots and of the tower operators. Thus, he charged the jury that, because of the control exercised by the tower at an airport, a pilot who receives clearance to land is entitled to assume that all other craft in the area do not constitute a collision hazard to it (X 2111A). The regulations, however, forbid such an assumption. They place in the tower operator complete discretion as to what detailed information he will volunteer, and they require the pilot to retain direct responsibility for the safety and course of his craft regardless of the information, if any, relayed by the tower. Even appellee objected to this portion of the judge's charge to the jury (X 2121A) and we assume that its position has not changed now that the case is on appeal.

air traffic controller's functions. Where the claim rests upon official acts "in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution." *Louisiana v. McAdoo*, 234 U.S. 627, 633.

It is true, of course, that almost all conduct of government employees may involve some choice or discretion. But the discretionary acts covered by the exception clause, 2680(a), are those in which the official, in exercising his judgment, considers factors which are peculiarly governmental in nature. In this respect, clearly, the air traffic controller is very different from the mail truck driver whose discretion as to the manner of driving is no different from that of any private driver.

First, the whole tenor of the activities of the control tower is to regulate and supervise the conduct of others. As we have already noted (above, p. 30), the affirmative instructions of the tower operators carry the binding authority of law; punitive sanctions may be imposed for disobedience. A pilot must obey the tower's oral or visual direction just as he obeys the written regulation. In fact, the written regulations recognize and provide that, despite their intricate detail they may be superseded, contradicted or departed from whenever *in the judgment* of the tower the situation requires it.¹⁰⁸ Surely the promulgation of a regulation, however negligently drawn, would not be subject to review by the courts.¹⁰⁹ The discretion involved in the oral instruction of the tower is similarly beyond judicial reach.

Second, many of the factors which the control tower operator considers in exercising his judgment are those which

¹⁰⁸ The "Foreword" to the *ANC Manual* (Court's Exhibit No. 1: "*Procedures for the Control of Air Traffic*", adopted by the Air Force, Navy and CAA, May 1, 1948), states: "These procedures are to be observed by air traffic control personnel of Air Force, Navy, CAA, and other civil air traffic control agencies. However, instances will arise where air traffic can be controlled more efficiently and safely by deviation from these standards. *In such cases, controllers on duty are expected to use their best judgment.*" (Italics ours.) Similar language appears in the *Manuals* previously issued on October 15, 1945 and November 1, 1941.

¹⁰⁹ See *supra*, p. 22, fn. 29, and p. 23, fn. 33.

a private person is not legally compelled to heed in determining private action. The tower's primary objective in supervising and controlling flight in the vicinity of an airport is "to promote the safe, orderly, and expeditious movement of air traffic."¹¹⁰ A private person normally owes no affirmative duty to aid or assist or safeguard another private person, no less the public in general, and certainly has no obligation, beyond compliance with law, which relates to expediting the movement of air commerce. Private considerations, such as maintaining a schedule or preferring a certain runway to another, are of no moment whatever. The tower operator may direct a plane to circle or turn in order to space traffic; he may direct aircraft away from the field because of congestion or bad weather or because a student pilot is near; he may direct an immediate take-off or delay a landing to clear the way for others; he may instruct a pilot to avoid congested housing areas; these and countless other directions may be given for a variety of reasons, all within the discretion of the tower operator, and all because of public rather than private considerations.

It follows that the failure of the control tower operators to prevent the collision through their negligence in supervising and regulating air traffic, like the failure of the Coast Guard to prevent the fire and the explosion in the Texas City disaster through its negligence in supervising and regulating the loading of the fertilizer, "are classically within the exception." *Dalehite*, 346 U. S. at 43.¹¹¹

¹¹⁰ 14 Fed. Reg. p. 3328, § 26.50-4; *id.*, p. 3327, § 26.50 (1) (h).

¹¹¹ Public policy dictates the same conclusion. See *P. Dougherty Co. v. United States*, 207 F. 2d 626, 634 (C.A. 3), certiorari denied, 22 U.S. Law Week 3209, where, in holding the United States immune from liability for the fault of the Coast Guard in rescue operations, the court stressed the inevitable consequences on the morale and effectiveness of the conduct of federal employees seeking to aid others if their emergency decisions are "to be scrutinized, weighed in delicate balance and adjudicated by Monday-morning quarterbacks functioning in an atmosphere of serenity and deliberation far from the maddening crowd of tensions, immediacy and compulsions which confront the doers and not the reviewers. * * * If men are to be brought to an abrupt halt in the midst of crisis—to think first that if they did err in their performance they may expose their Government to financial loss and themselves to disciplinary measures * * *, and then to pause and deliberate and weigh the chances of success or failure in alternate * * * procedures, the delay may often prove fatal" to those who may require immediate aid. This reasoning is especially apt to the tower operators whose conduct frequently must be based on split second decisions.

4. *The traffic controllers would themselves be immune from liability; the United States, as their employer, is similarly immune.*—That the discretionary function exception extends to this situation is further emphasized by the fact that the government employees directly responsible would themselves be immune from liability for their allegedly negligent conduct. Public officials cannot be subjected to suit for damages for the manner of performing authorized acts involving the exercise of judgment and discretion.¹¹² *Spaulding v. Vilas*, 161 U.S. 483, 498-9; *Yaselli v. Goff*, 12 F. 2d 396 (C.A. 2), affirmed, 275 U.S. 503; *Gregoire v. Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949. We have shown above that the acts of the tower personnel involved the exercise of judgment and discretion. Even the dissent in the *Dalehite* decision recognized the soundness of the view that the discretionary function “exception clause of the Tort Claims Act protects the public treasury where the common law would protect the purse of the acting public official.” 346 U.S. at 60.

This suggests an additional reason, apart from the discretionary function exception, which precludes recovery here. The United States, under the Act, is liable only “under the doctrine of respondeat superior.” *United States v. Campbell*, 172 F. 2d 500, 503 (C.A. 5), certiorari denied, 337 U. S. 957; *United States v. Eleazer*, 177 F. 2d 914, 918 (C.A. 4), certiorari denied, 339 U.S. 903. *Respondeat superior* liability is a vicarious or derivative liability. The Act, in other words, “merely subjects the Government to the same liability as the delinquent employee in accordance with local law.” *In re Texas City Disaster Litigation*, 197 F. 2d 771, 776 (C.A. 5), aff’d sub nom. *Dalehite v. United States*, 346 U. S. 15. If the delinquent employee is himself immune from civil liability, “his employer must also be entitled to a like immunity.” *N. O. & N. E. Railroad Co. v. Jopes*, 142 U. S. 18, 24. And this principle—that, in Tort

¹¹² “[I]f the act complained of was done within the scope of the officer’s duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion * * *.” *Cooper v. O’Connor*, 69 App. D.C. 100, 99 F. 2d 135, 138, certiorari denied, 305 U.S. 643.

Act cases, when its employee is immune, the Government is, too—was expressly relied on not only by the Fifth Circuit in the *Texas City* case, *supra*, but also by the Eighth Circuit in *National Manufacturing Co. v. United States*, — F.2d — (Feb. 8, 1954). See also, *Cromelin v. United States*, 177 F. 2d 275 (C.A. 5), certiorari denied, 339 U.S. 944; *Kendrick v. United States*, 82 F. Supp. 430, 432 (N.D. Ala.).

II

THE TRIAL COURT'S FINDINGS DO NOT PROVIDE A SUFFICIENT FACTUAL BASIS FOR ITS ULTIMATE DETERMINATION OF NEGLIGENCE.

We have argued above that because appellee's claims arise out of the performance of regulatory and discretionary activities they are not within the coverage of the Tort Claims Act and that, regardless of whether or not tower negligence was established, appellee's claims fail to state a cause of action. But assuming, *arguendo*, that a cause of action is stated, we will show that the judgments below must be reversed both for procedural and substantive errors.

Under Rule 52(a) of the Federal Rules of Civil Procedure, the trial court must find the facts specially in actions which, like those under the Tort Claims Act, are tried without a jury. The Supreme Court has stated that "it is of the highest importance" that there be explicit findings of fact in "fair compliance with Rule 52(a)." *Mayo v. Canning Co.*, 309 U.S. 310, 316. There should be findings of subsidiary facts, "in such detail and exactness as the nature of the case permits," which are sufficient to indicate the factual basis for the ultimate conclusion. *Kelley v. Everglade District*, 319 U.S. 415, 420, 422. In "hard and complex cases," no less than in others, trial judges are under a duty "to make a studied effort toward definiteness. Statements conclusory in nature are to be eschewed in favor of statements of *the preliminary and basic facts* on which the District Court relied. * * * Otherwise, their findings are useless for appellate purposes." *Dalehite*, 346 U.S. at 24, fn. 8 [emphasis ours]. See also *Interstate Circuit v. United*

States, 304 U.S. 55, 56; *Virginia Ry. v. United States*, 272 U. S. 658, 675. The rule must be "strictly followed" (*Hurwitz v. Hurwitz*, 78 App. D.C. 70, 136 F. 2d 796, 799), not only because such preliminary findings are an essential aid to the appellate court, but also because they fulfill the purpose of "evoking care on the part of the trial judge in ascertaining the facts. * * * Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper" (*United States v. Forness*, 125 F. 2d 928, 942-943 (C.A. 2), certiorari denied, 316 U.S. 694).

Examination of the findings in this case discloses that the trial judge's determination that the tower operators were negligent is premised on preliminary and basic facts which, despite their crucial nature, are not themselves found. And, without these preliminary findings, we think, it is impossible to determine whether the conclusionary findings of negligence are correct or erroneous.

The crux of the factual case is Finding No. 7 (I 50A-51A) in which the trial judge found the tower operators "were guilty of negligence in the circumstances in question in that, *having in mind the respective positions of said planes in relation to each other and their speed of approach and descent*: (a) they failed to issue a timely warning to the Eastern plane concerning the P-38 being on final approach; (b) they failed to warn the P-38 that the Eastern plane was on final approach; (c) they cleared both planes for the same runway at approximately the same time; and (d) they failed to keep both planes advised of the activities of the other." [Emphasis ours.] But nowhere does the judge make any findings as to the position of the planes in relation to each other, or as to their speed or their rate of descent. The testimony on these matters was wholly conflicting and contradictory, yet it is patently clear that these missing factors are of controlling importance in determining whether there was any negligence at all on the part of the tower. For example:

(i) As to the failure of the tower to issue "timely warning" to the DC-4 (a finding which assumes there was a

warning, but not a *timely* one)—the very cornerstone of appellee's case against Eastern was that the pilots of the DC-4 could and should have seen the P-38 by maintaining a proper look-out as the DC-4 turned from downwind to base to final, that no tower warning was necessary, but that in any event, they should have seen the P-38 and avoided the collision once the tower did issue its warnings. Appellee's own witness, Lt. Shaw, asserted unequivocally that he heard the tower warn the DC-4 of the P-38 at 11:45 (see *supra*, pp. 7-8, and p. 9, fn. 13). This was approximately one to two minutes before the collision which occurred at 11:46-11:47 (I 21A, 49A). The trial judge found that Eastern was negligent (I 51A, 45A). This finding indicates that appellee's proof on this point, through the testimony of Shaw, was given credence. By the same token, however, it indicates that the finding that timely warning was not given to the DC-4 is clearly erroneous, because a one to two minute warning unquestionably allowed the DC-4 sufficient time to be alerted to the danger and sufficient distance in which to alter its course.¹¹³

Nevertheless, the position, course, speed, altitude, and rate of descent of each plane at the moment the warning was given—at whatever point in time it was—are of decisive quality in determining whether the warning was timely or not, or in determining whether there was any need for a warning at all. From the evidence in the record, at the moment of the warning, the planes could have been two or four or six or more miles apart, and in clear view of each other, depending upon whose testimony is believed as to their speeds, paths and rates of descent.

¹¹³ If the court's finding that Eastern was negligent is not based on the DC-4 having received a timely warning from the tower, then it must be based on the fact that its pilots were in a position where they could and should have seen the P-38 in time to realize there was a collision hazard, without reference to any tower warning. But in that event, there would be no duty on the tower to issue any warning. Especially so since the regulations require the tower operator to issue traffic information only when *in his judgment* it is necessary (*supra*, pp. 45-6). If the DC-4 was in a position where its pilots should have seen the P-38, the tower operator's judgment that a warning was unnecessary obviously would be vindicated. Thus, either basis for the court's finding that Eastern was negligent compels the conclusion that the tower was not.

(ii) As to the failure of the tower to warn the P-38 that the Eastern plane "was on final approach," a phrase of very limited and technical meaning, as the court knew (X 2108A, 2110-1A), the testimony is that the DC-4 proceeded only a quarter of a mile from the time it completed its base leg until the collision (IV 734-5A, 743A, VI 1302A). This distance, by definition of the term, constituted the "final approach." The speed of the DC-4 determines how long it was "on final approach." If it was traveling at about 120 miles per hour (176 feet per second), this distance would be covered in seven or eight seconds, not more than ten, and such in fact was the testimony (IV 744A, 751A). At a greater speed, even less time would elapse. This would indicate the exceptionally brief interval available to the tower to contact the P-38 to issue a warning and, when considered with the testimony of the failure of the P-38 to respond to the tower's calls (*supra*, pp. 7-8), must certainly impugn the finding of negligence. See, *Gatton v. Cullins*, 78 App. D. C. 170, 138 F. 2d 425.¹¹⁴

(iii) The propriety of clearing two planes to land on the same runway at the same time also depends on the positions, speeds and rates of descent of the two planes, for, if two planes are, say, four miles apart, one above and behind the other, both proceeding at the same rate of speed, a simultaneous clearance to land given to both planes would unquestionably result in safe landings for both and could not constitute negligence.¹¹⁵

¹¹⁴ This finding not only disregards the testimony of the tower witnesses that two unacknowledged warnings were given to the P-38 concerning the DC-4 (*supra* p. 8), but also disregards Bridoux's own testimony under questioning by appellee that when he did receive a message to "clear to the left" he did not act because he thought the instruction was meant for someone on the ground (II 438A).

¹¹⁵ This finding of negligence is a complete departure from the pre-trial order (I 23-24A). At pre-trial and in accordance with Rule 16, F.R.C.P., facts were stipulated, the issues were drawn, appellee set forth in detail the specific acts of negligence charged to the tower, and these were incorporated in the pre-trial order. The acts charged related to the alleged omission of the tower to issue warnings to the two planes and the alleged failure to take steps to separate them so as to avoid the collision (*ibid.*). Nowhere in the order is there any intimation that there would be an issue concerning the affirmative action of the tower in clearing the planes to land. Moreover, appellee, in its affirmative case, made no attempt to prove such negli-

(iv) Whether the failure to keep each plane advised "of the activities of the other" is negligence depends upon what those activities were, that is, their positions, courses, speeds and rates of descent at relevant points of time as well as the instructions they had requested and had been given, etc., all missing from the court's findings. Moreover, this finding and those relating to the failure to apprise each plane of the other being on final approach, assume that the tower has some duty to issue such information to aircraft flying near the airport. Not only is there no such duty (see *supra*, pp. 45-6), but, in the light of the very heavy traffic at a busy airport (see *supra*, pp. 27-8, fn. 51), it is impractical if not impossible to apprise each plane of the activities of other craft nearby. Indeed, the implications of duty which underly this finding are so enormous and so startling that it must be that no such duty exists. For it is not uncommon for five, ten or more planes to be within the immediate area of an airport at the same time. To require the tower to advise, and keep advised, each plane as to the activities of the others borders on the absurd. By the time the tower would complete a transmission to one plane, the positions of the others would be materially changed. It is no exaggeration to say that the tower would be so busy fulfilling this duty there would be no time for other essential functions. This, it would seem, is the reason why the Air Traffic Rules make the pilot, not the tower, "directly responsible" for the safe operation of the aircraft and for maintaining an appropriately safe distance between aircraft (14 C.F.R. §§ 60.2, 6015). The information to be issued to the pilot is expressly left to the judgment and discretion of the tower operator. Accordingly, findings which invoke such a duty are erroneous as a matter of law.

gence. Appellee offered no proof whatever relating to the *landing* clearance, as distinguished from clearance to enter the pattern, given to the DC-4.

Pre-trial procedure is intended to effect a simplification and limitation of the issues. A pre-trial order, when entered, "controls the subsequent course of the action." (Rule 16). Since the order neither mentioned nor reserved this issue, it follows that this finding is beyond the scope of the case as framed at pre-trial and therefore should be rejected. See, *Fowler v. Crown, Zellerbach Corp.*, 163 F. 2d 773 (C.A. 9); *Burton v. Weyerhaeuser Timber Co.*, 1 F.R.D. 571 (D. Ore.); 6 Cyc. Fed. Proc. (3d Ed.) p. 307.

Finally, the entire Finding No. 7 is fatally vague. There is no indication whether the words "*having in mind* the respective positions of said planes" etc., refer to the mind of the tower operators, upon whose judgment the regulations rely for the issuance of traffic information and clearances, or to the mind of the trier of the facts. If it refers to the former, then, on the basis of the testimony of the tower operators, there can be no question that the findings are erroneous. If it refers to the facts in the mind of the trial judge, the lack of expression of those facts which premise the findings of negligence makes it impossible to weigh the correctness of his findings.

With findings as indefinite and incomplete as these, proper review of the conclusion of negligence is impossible. We believe that the evidence clearly shows that the findings are erroneous in fact and in law, but, at the very least, the case should be remanded for determination of the preliminary and basic facts.

We believe further that a review of the entire evidence relating to the place of the accident compels the conclusion that the trial judge's finding (I 51A, 45A) that the collision occurred over water in the District of Columbia, rather than over land in Virginia, is clearly erroneous. But since Appellant Eastern Air Lines has briefed this point, to avoid duplication we shall not argue it here. It should be noted, however, that in determining the Government's contention on this point the controlling principles are those of Rule 52(a), F.R.C.P., and *United States v. U. S. Gypsum Co.*, 333 U.S. 363, 395, since our case was tried by judge and not by jury.

III

THE DISTRICT COURT ERRED IN FAILING TO APPLY THE LAW OF THE PLACE WHERE THE NEGLIGENT ACTS OR OMISSIONS OCCURRED.

The Tort Claims Act provides in explicit terms that the Government's liability for the negligence of its employee shall be measured "in accordance with the law of the place where the *act or omission occurred*." 28 U.S.C. 1346(b) (emphasis ours). Here, the allegedly negligent acts (issu-

ing clearances to land) and omissions (failing to issue warnings) occurred in the control tower of the National Airport which, of course, is in Virginia. Accordingly, unless the unmistakable language of the Act is to be ignored, it is Virginia law which must be applied.¹¹⁶

But the trial judge, having found that the collision occurred in the District of Columbia, applied the District law in measuring the Government's liability. In doing so, he purported to follow the general conflicts rule which, in most instances, disregards the place of the negligent act or omission and, instead, uses the law of the place where the harmful force takes effect upon the body. Even under that rule, however, it is dubious whether the District law is the one to be applied in the circumstances of this case.¹¹⁷ Nevertheless, this appeal permits no occasion for examining into the difficult problem of application of the general rule, nor does the case have to be remanded for additional factual findings

¹¹⁶ The Act (59 Stat. 552) establishing the boundary line between Virginia and the District of Columbia places the Washington National Airport within Virginia. See also, 54 Stat. 686 (describing the Airport by metes and bounds). It also provides that, subject to minor limitations, the United States shall have exclusive jurisdiction in the Washington National Airport. Cf. 16 U.S.C. 457 (actions for death or injuries caused by the neglect or wrongful acts of a person within a place subject to the exclusive jurisdiction of the United States, shall be governed by the laws of the State within whose boundaries such place is located).

¹¹⁷ This case is not as simple as the classic situation in which the actor, standing in one state, shoots someone standing in another state, for there the place at which the harmful force takes effect upon the body and the place at which the injury occurs coincide, and the victim did not request the shot. Here, each plane initiated the broadcasts from the tower by requesting clearances. When each such request was made, the respective planes may have been over Virginia, or the District, or Maryland, or each may have been over two states during the interval of the transmission. Similarly, each plane may have been over one or more jurisdictions when the harmful force came to rest, that is, when each received its clearance (and Bridoux, who said he requested and received two clearances, may have been over a different state each time). Similarly, too, each plane may have been over a different state when the negligent message had its initial effect, that is, when each pilot decided to act or did act on it, as by beginning some phase of the landing. Further complicating the question of choice of law are the tower's alleged omissions to send messages apprising each plane of the other's activities and of each being on final approach: over which state was each plane when each such message should have been sent; and suppose the omissions occurred while the planes were over one jurisdiction, but the affirmative messages were received while flying over another? That application of the law of the place of collision may not be the appropriate answer to questions of this kind has been indicated by frequent legal comment. *E.g.*, M. Rheinstein, *The Place of Wrong*, 19 Tul. L. Rev. 4 (1944); A. A. Ehrenzweig, *Intentional Multistate Torts*, 36 Minn. L. Rev. 1 (1951); Knauth, *Renvoi and Other Conflicts Problems in Transportation Law*, 49 Col. L. Rev. 1, 19-20 (1949).

(see *supra*, fn. 117) necessary to resolve the choice of law question. Because, Congress has foreclosed the matter by prescribing a different rule in the Act, one which has been applied elsewhere. See, *Burkett v. Globe Indemnity Co.*, 182 Miss. 423, 181 So. 316; *Vrooman v. Beech Aircraft Corp.*, 183 F. 2d 479 (C.A. 10); *Caldwell v. Gore*, 175 La. 501, 143 So. 387; *Levy v. Daniel's U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163. The Act requires application of the law of the place "where the act or omission occurred." This provision is clear and without ambiguity.

Since following the literal mandate of the language of the Act would not produce an absurd or untoward result, but would in fact adopt the law of the state (a) in which the federal employee is located and controlled by his superiors, (b) which determines the applicable standard of care governing the federal employee, (c) which fixes the rights and privileges of the actor, and (d) which results in simplicity and certainty, there is no warrant whatever for departing from the rule expressly prescribed by Congress (cf. *United States v. Mo. Pac. R. Co.*, 278 U.S. 269, 277-278; *Helvering v. City Bank*, 296 U. S. 85, 89).¹¹⁸

The acts and omissions of the federal employees having occurred in Virginia, the law of that State must be applied. Under the Virginia law applicable as of the date of the accident, recoveries in death actions are limited to \$15,000. Va. Code, 1942, § 5787. Therefore, at the very least, the United States is entitled to a modification of the judgment in No. 12,017 reducing the award to appellee from \$50,000 to \$15,000.

¹¹⁸ This is but one of several instances under the Tort Claims Act in which the claimant's right to relief against the Government may differ from that which he might obtain against a private person in like circumstances. Among other instances, apart from the Act's exceptions, are: the Act prescribes its own period of limitations which may be shorter than that of the state in which the tort occurs (28 U.S.C. 2401(b); see *Maryland v. United States*, 165 F. 2d 869 (C.A. 4, 1947)), the claimant cannot obtain trial by jury (28 U.S.C. 1346(b)), nor punitive damages or interest prior to judgment (28 U.S.C. 2674). These provisos merely illustrate the settled principle that in consenting to suit against the Government, Congress may impose conditions upon the right to sue.

CONCLUSION

For the reasons above stated, it is respectfully submitted that appellee's claims are excluded from the coverage of the Tort Claims Act; therefore, the judgments below should be reversed with directions to enter judgments for the United States dismissing the complaints. However, if it is decided that the claims are actionable, then it is respectfully submitted that this Court should hold that the District Court's findings are either (a) clearly erroneous, in which event dismissal of the complaints should be directed, or (b) insufficient to indicate the factual basis for the conclusions of negligence of the United States, in which event the cases should be remanded for further proceedings. Otherwise, the judgment in No. 12,017 should be modified by reduction to the amount of \$15,000.

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April, 1954.

APPENDIX

The Federal Tort Claims Act (see *supra*, p. 14, fn. 24) provides in pertinent part (28 U.S.C.):

Section 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

Section 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

Section 2680. *Exceptions.*

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

FR

**GOVERNMENT'S RESPONSE TO APPELLEES'
PETITION FOR REHEARING**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12017 and 12018

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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*United States Court of Appeals
For the
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GOVERNMENT'S RESPONSE TO APPELLEES' PETITION FOR REHEARING

INTRODUCTORY

1. *The facts.*—The trial judge found that the Government's air traffic controllers were negligent in their regulation of air commerce in that they failed to warn or apprise each plane of the other's activities and in that they cleared both planes for the same runway at approximately the same time (I 50-51A). It is undisputed that the allegedly negligent acts and omissions of the air traffic controllers occurred in the Airport control tower located in Virginia. On the other hand, the trial judge made no findings as to the location of each plane when each assertedly negligent act and omission occurred. Nor did he make any finding as to where the P-38 and the DC-4 were when each radioed its request for clearance to land, nor where they were when each pilot received the tower message giving such clearance, nor where they were when each pilot acted upon such clearance. He made no findings as to where the planes were when the tower did issue warnings; he made no findings as to where they were when the tower failed to issue additional warnings or to notify each plane of the other's activities. The record indicates that when the alleged negligence occurred the planes were flying either over Virginia, or Mary-

land, or the District of Columbia, or any combination of two or three of these jurisdictions. The trial judge did find that the tower negligence concurred with the negligence of Eastern's pilots in causing the collision (I 51A, 45A), and that the collision occurred in the District of Columbia (*ibid.*). He made no findings, however, as to whether appellees' decedents were injured or killed at the time of the impact of the P-38 on the DC-4, or at the time of the impact of the DC-4 on the earth. Nor did he make any findings as to whether appellees' decedents were in the forward part of the DC-4 which fell in the water in the District of Columbia, or in the aft part of the plane which struck the ground in Virginia.

Under Virginia law applicable in 1949 when the accident happened, recoveries for wrongful death were not permitted to exceed an amount in excess of \$15,000. Va. Code, 1942, § 5787.¹ There is no limitation upon recovery under either District of Columbia or Maryland law.

2. *The contentions.*—The Government contended, and the majority of this Court held, that the Government's liability must be measured by the law of Virginia because the Tort Claims Act, in explicit terms, requires application of the law of the place where the negligent "act or omission occurred" (28 U. S. C. 1346 (b)). Appellees now seek a rehearing on this point contending that this ruling is erroneous. According to appellees, the Act does not mean what it says when it directs application of "the law of the place where the act or omission occurred"; that despite Congress' use of this language it really intended that the law of the place where the act or omission occurred be totally ignored, and instead, that the law to be invoked is that of the place where the tort, or the "impact," or the injury, or the death occurred.

Appellees' arguments in support of their view fall essentially into four broad categories: First, that the language of the Act is not explicit, but is ambiguous; that even a literal interpretation requires rejection of the law of the place where the

¹ By amendment in 1952 the maximum permissible recovery was increased to \$25,000. Va. Acts of Assembly, 1952, Ch. 60; Va. Code, 1950 (1954 Cum. Supp.), § 8-636. The amendment does not provide for retroactive application.

negligent act or omission occurred because the word "act" does not mean "act" in the ordinary sense, but means the legal consequences of an act (Pet. pp. 2-3, 7, 9, 14-15). Second, that the purpose of the Tort Claims Act is to make the United States liable to the same extent as a private individual; that a private individual's liability is not dependent upon the law of the place of his negligent conduct but upon the place where that conduct results in injury; *ergo*, that this Court's decision adhering to the plain meaning of the Act's language is "utterly at variance with the purpose of the statute" and will produce absurd results (Pet. pp. 3, 10, 14-15, 19, 21). Third, that the legislative history—primarily because of a remark by Assistant Attorney General Shea not directed to the question of applicable law but directed to the subject of venue, and otherwise because of the absence of legislative materials revealing a Congressional purpose to reject the normal conflicts rule as to choice of law—constitutes "persuasive evidence" that Congress really intended that the phrase "law of the place where the act or omission occurred" be read as "law of the place where the injury [or tort, or impact, or death] occurred." And, fourth, that Supreme Court and other decisional dicta support their view.

I

The language of the act is explicit; its plain meaning controls

That the liability of the United States is to be determined by the law of the place where the negligent act or omission occurred is set forth in explicit terms in two sections of the Tort Claims Act (28 U. S. C. 1346 (b), 2672) and alluded to in a third section (28 U. S. C. 2674). Section 1346 (b) confers on the district courts jurisdiction of claims against the United States for property damage or for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place *where the act or omission occurred*." [Emphasis added.] Section 2672 uses identical language in authorizing the head of each Federal agency to

purposes of the Tort Claims Act (Pet. 21). The argument has no merit. The primary purpose of the Act was twofold: to relieve Congress of the crushing burden of considering thousands of private bills for relief from tort, and to extend a judicial remedy to claimants who, because of the doctrine of sovereign immunity, had no access to the courts. *Dalehite v. United States*, 346 U. S. 15, 24-30; *Feres v. United States*, 340 U. S. 135, 140. It would be ludicrous to suggest that the Court's decision on the applicable law point in any way detracts from or collides with this fundamental purpose of the Act. Certainly the decision does not deprive claimants of access to the courts. Nor does it throw appellees' claims back to the Congressional Committees on Claims.

But appellees stress the language of the Act that the United States shall be liable to the same extent as a private individual, and from this springboard they argue that Congress intended that their remedy against the United States shall be the same as they would have if the defendant had been a private person. The Act, however, clearly dictates that the remedy shall not, in every instance, be coextensive with that available against a private person. There are procedural and substantive differences. There are departures from the common law.

To illustrate a few of the differences between a claimant's right to relief against the Government under the Act and his right to relief against a private individual in like circumstances: The Act permits a claimant to sue only in the Federal courts, not in the state courts which are available against a private individual (Sec. 1346 (b)). The Act prescribes its own period of limitations which may be shorter or longer than that of the state in which the tort occurs and which terminates a private individual's liability (Sec. 2401 (b); see *Maryland v. United States*, 165 F. 2d 869 (C. A. 4)). The claimant cannot obtain a trial by jury under the Act, although he could against a private defendant (Sec. 1346 (b)). He cannot obtain punitive damages under the Act even though state law may provide for it as against a private person (Sec. 2674). He cannot obtain interest prior to judgment under the Act regardless of the state rule governing private defendants (*ibid.*). The scope of employment of the federal employee whose negli-

gent act caused the claimant's injury is measured by federal law rather than by state law which would control in the case of a private defendant (*United States v. Sharpe*, 189 F. 2d 239, 241 (C. A. 4); *Williams v. United States*, 215 F. 2d 800 (C. A. 9)). Recovery may be obtained against a private person under the doctrine of absolute liability, but not against the United States under the Act (*Dalehite*, 346 U. S. at 44-45). A private person is answerable in damages for another's negligent driving under a permissive use statute, the United States is not. (See *United States v. Hull*, 195 F. 2d 64, 67 (C. A. 1).) The Act excludes claims based on numerous types of torts for which a private person is answerable (Sec. 2680 (h)). And the Act exempts the Government from liability for claims based on various types of activities although a private person would be liable in the same circumstances (Sec. 2680). These restrictions and limitations upon the remedy conferred by the Act, evidencing wide variances from the relief obtainable against a private person in similar circumstances, simply illustrate the settled principle that in consenting to suit against the Government, Congress may impose any conditions it chooses upon the right to sue and upon the nature of the remedy. The Tort Act's requirement of application of the law of the place where the act or omission occurred, rather than application of the law of the place of the act's consequences, is but another variance which Congress chose to insert.

We know of no case under the Tort Claims Act in which it was held that, because the Congress directed that the Government shall be liable to the same extent as a private individual, the plain meaning of those parts of the Act which call for relief different from that obtainable against a private individual should be nullified or twisted by construction so as to assure conformity with the relief available against a private individual. While a court may be tempted to alter or modify a legislative enactment which requires departure from the usual rule, or which fails to cover all situations, or possibly produces an inequitable result in a particular instance, it is not the function of the court to modify or "to engraft on a statute additions which we think the legislature logically might or should have made" (*United States v. Cooper Corp.*, 312 U. S. 600, 605).

Nor is there warrant for appellees' view that the literal reading of the Act results in "emasculatation or deletion" of any provision of the statute (cf. Pet. p. 20). On the contrary, it is obvious that it is appellees' construction of Sec. 1346 (b) which would produce that result. The construction sought by appellees might have followed had Congress ended Sec. 1346 (b) after the words "liable to the claimant," without adding "in accordance with the law of the place where the act or omission occurred." The construction they seek unquestionably would flow more easily by deletion of the latter words. On the other hand, to give the added words their natural meaning would lend significance to the clause and would avoid deletion by construction. Such a natural reading does not result in absurd or impossible results, as appellees argue (Pet. pp. 22-23). Of course a fertile imagination can hypothesize situations creating difficult problems of application of the rule, or ending in hardship. But difficulties in application of a statute's command cannot serve as a justification for stretching the plain meaning to something diametrically opposed, or to some hidden meaning. As the Supreme Court said in *Addison v. Holly Hill Co.*, 322 U. S. 607, 617-8:

"The natural meaning of words cannot be displaced by reference to difficulties in administration." * * * For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. * * * After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

Congress itself was fully aware that because of the restrictions, conditions and limitations written into the Act there would still be occasion for the private bill remedy—in instances of hardship or moral obligation or in other inequitable situations where the terms of the statute provided inadequate

coverage.⁴ The construction given by this Court to the words "the law of the place where the act or omission occurred" does not result in hardship or inequity. It does not result in any conflict with the basic purpose or policy of the Act. And it has the sensible benefit of adopting the law of the state (a) in which the federal employee is located and controlled by his superiors, (b) which determines the applicable standard of care governing the federal employee, (c) which fixes the rights and privileges of the actor, and (d) which results in greater simplicity and certainty. In such circumstances there is no warrant for departing from the rule expressly prescribed by Congress.

III

The legislative history does not furnish persuasive evidence that Congress intended that the words be given something other than their ordinary meaning

Where the language of a statute "is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed." *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 278. Of course that does not signify that we are to close our eyes to relevant legislative history just because the ordinary meaning of the statute's language is superficially manifest. But, as appellees' quotation (Pet. pp. 10-11) from *United States v. Dickerson*, 310 U. S. 554, 562, states, secondary legislative material must constitute "persuasive evidence" of a contrary meaning; if the legislative materials are "without probative value, or contradictory, or ambiguous, * * * [they] will not be permitted to control the customary meaning of words." [Emphasis added.] Although the Tort Claims Act itself has an extensive legislative history, the legislative data relating to the particular language

⁴ See, e. g., Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Sen., 76th Cong., 3d Sess., on S. 2690, pp. 34, 38, 39, 52-53; Hearings before Subcommittee No. 1, of the Committee on the Judiciary, H. of Reps., 76th Cong., 3d Sess. on H. R. 7236, pp. 15, 22.

here in question is so sketchy and ambiguous that it falls far short of being "persuasive evidence" that the words were intended to mean something other than what they say.

Most of the earlier tort claims bills introduced did not contemplate making the United States liable "to the same extent" as a private individual. They proposed systems of compensation for personal injury or death to be administered by the United States Employees' Compensation Commission.⁵ S. 2690, 76th Cong., 1st Sess., introduced in 1939, proposed conferring jurisdiction on the courts to determine claims for injury or death "caused by the negligent or wrongful act or omission" of Government employees (Sec. 201). The bill provided: "In respect to such claims the United States shall be liable to the same extent and in the same manner as a private individual under like circumstances * * *," but it did *not* contain the significant language now in Sec. 1346 (b), *viz*, "in accordance with the law of the place where the act or omission occurred."⁶ The same was true of H. R. 5299 and H. R. 5373, 77th Cong., 1st Sess., Sec. 201. The first time the "place where the act occurred" language appeared was in the Committee Print of a Committee revision of H. R. 5373, 77th Cong., 2d Sess., Secs. 201, 301. The Committee Reports are inconclusive as to the reason for the change, but one thing which is made clear and which refutes appellee's argument to the contrary (Pet. 16-17), is that the words "place where the act or omission occurred" mean the place where the delinquent or negligent act or omission occurred.⁷

⁵ *E. g.*, see H. R. 6716, 69th Cong., 1st Sess.; S. 211, 72d Cong., 1st Sess.; S. 1043, 74th Cong., 1st Sess.

⁶ It was indicated at hearings held on that bill, which did not have the phrase directing application of the law of the place where the act occurred, that the applicable law would be the law of the situs of the alleged tort. Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Sen., 76th Cong., 3d Sess., on S. 2690, p. 44.

⁷ Explaining the difference between H. R. 5373 and the Committee's revision, the draftsmen said (*Memorandum for the Use of the Committee on the Judiciary, 77th Cong., 2d Sess.—Explanation of Committee Print of H. R. 5373*, pp. 6-7 [emphasis added]):

"The present bill [the Committee Print] follows closely the pattern of H. R. 7236 and H. R. 5373, *with two important exceptions*. H. R. 7236 vested concurrent jurisdiction over tort claims in the United States District Court

The Committee's revision of H. R. 5373 was introduced as H. R. 6473, and the Shea testimony which appellees rely on so heavily (Pet., pp. 11-12) occurred during hearings on that bill. We do not believe that in this instance any probative significance can be attributed to his remarks because, as appellees recognize, he was not addressing himself at all to the question of what law governs, but only to the venue provision. When it is remembered that uppermost in the minds of those working on a proposed tort claims law was negligence in the operation of vehicles, accidents caused by negligent driving of postal trucks or military vehicles (*Dalehite, supra*, 346 U. S. at 28), which seldom create conflict of laws problems, it is apparent that his remark can have little bearing on the question at issue. Elsewhere, as appellee notes (Pet., p. 11, fn. 2), Mr. Shea referred several times to the fact that "local law" shall govern. This sheds no light at all, because "local law" could mean either the place where the negligent act or omission occurred, or the place of the consequences of the negligent conduct. In short, his testimony is not on point, is ambiguous and unproductive of aid on the question at issue.

and the Court of Claims. The present bill vests exclusive jurisdiction in the district courts sitting without a jury, with an appeal from their decisions to the Court of Claims. * * *

"The other major difference is that the present bill subjects the determination of the validity of the claim, the defenses thereto, and the distribution of the recovery, to *the law of the place where the delinquent act or omission occurred*. H. R. 7236 and H. R. 5373 may, as a matter of law, have embodied the first of these requirements, but the present bill states this explicitly, and leaves to the local law the determination of certain matters specifically treated in H. R. 7236 and H. R. 5373, such as the beneficiaries entitled to the recovery in death cases, the defense of contributory negligence, and the like. * * *

It is pertinent to observe also the remarks of the draftsmen concerning another change made. H. R. 5373, in Sec. 303 (12), had excluded from coverage of the bill, "Any claim arising in a foreign country *in behalf of an alien*." The Committee Print deleted the italicized words with this explanation: "Claims arising in a foreign country have been exempted from the present bill, whether or not the claimant is an alien, since liability is to be determined by the law of *the situs of the wrongful act or omission*" (*Memorandum, etc., supra*, at p. 30 [emphasis added]). It is noteworthy that the Committee did not use the words "situs of the tort" or "situs of the injury" or "place where the cause of action accrued", but instead used place of conduct language.

There is, if anything, even less substance to appellees' heavy emphasis (Pet., pp. 12-14) on the Committee Reports⁸ relating to the 1948 Amendment of the Tort Claims Act. Appellees stress the sentence in the Reports that each case is determined "in accordance with the law of the state where the *death* occurred" (emphasis added). However, even under the general conflicts rule, which appellees apparently urge on this Court, it is not the law of the place where the *death* occurred that controls. A claimant may be injured by a defendant's negligent driving in Massachusetts, but die in a hospital in Vermont. Under the general rule, the law of the place of death (Vermont) is irrelevant. Neither does it have relevance under the rule of the Tort Claims Act. The Committees obviously had in mind cases in which the place of the negligent act and the place of the resultant death were within one and the same jurisdiction, a state which only permitted punitive damages. Clearly they were not addressing themselves to problems presented by multi-state torts.⁹ One thing which is significant about the 1948 Amendment is that the words added to the statute themselves retain the distinction, discussed above, between the place where the act or omission complained of occurred, on the one hand, and the consequences of the act (death), on the other. In that respect reference to the 1948 Amendment supports, rather than detracts from, this court's decision.

Finally, with reference to legislative history, there is appellees' argument that the phrase "in accordance with the law of the place where the act or omission occurred" should not be given its ordinary meaning because to do so would reject the general conflicts rule, and there is nothing in the legislative history to indicate that Congress intended to reject that general rule (see Pet., p. 16). But in construing a statute we

⁸ H. Rept. No. 748 and S. Rept. No. 763, 80th Cong., 1st Sess.

⁹ We note again that the District Court in this case made no findings as to where the deaths (or injuries) occurred. We suggest there is no warrant for appellees' assumption that the deaths (or injuries) occurred when the two planes collided. It is equally possible that the deaths (or injuries) resulted from the impact of the DC-4 with the earth. Part of the DC-4 fell to the ground in Virginia. Hence the deaths (or injuries) may have occurred there.

start with the presumption that the ordinary meaning of the words used in the Act expresses the intent of Congress. Here, the ordinary meaning dictates a rule which differs from the general conflicts rule. We may look to the legislative history and to other materials for "persuasive evidence" that some meaning other than the ordinary meaning was intended. However, the *absence* of legislative materials cannot be regarded as "persuasive evidence" that the ordinary meaning was not intended. In other words, to compel a departure from the ordinary meaning of the language used in this instance, it is necessary to find affirmative evidence, persuasive in nature, that Congress intended *to retain* the conflicts rule. Absent such evidence, there must be adherence to the explicit language of the statute.

IV

This Court's decision on the question of applicable law is not contrary to Supreme Court decisions

Appellees argue (Pet. pp. 27-29) that this Court's decision is contrary to remarks made in the course of the *Feres* opinion, 340 U. S. 135, 142-143, and in *United States v. Brown*, 348 U. S. 110. The short answer is that the point now in issue in the present case was not involved in those cases, was not briefed or argued, and a reading of those opinions in context demonstrates unmistakably that the Supreme Court was not addressing itself to a situation in which the place of the negligent act was different from the place where the cause of action accrued.

Of far greater significance is the *Dalehite* case where the question was involved and was briefed and argued. *Dalehite* involved a terrible explosion of fertilizer at Texas City, Texas. Part of the fertilizer had been manufactured on behalf of the Government in Iowa, part in Nebraska. It was later shipped to Texas. The claimants alleged, *inter alia*, negligence in the manufacturing, packaging and shipment as the proximate cause of the explosion. The majority of the Supreme Court, having found that the discretionary function and governmental function exceptions of the Act barred recovery, did not have to discuss the problem of applicable state law. Not so the dissenters.

They would have imposed liability for negligence in manufacture, hence it was necessary for them to consider whether the law of Iowa and Nebraska (where the negligent acts occurred) or the law of Texas (where the explosion—the consequences of the acts—occurred) applied. Although of the view that recovery would have been permitted under the law of any one of these three states, the opinion of the dissenting Justices clearly acknowledges the rule adopted by this Court. Speaking through Mr. Justice Jackson, they said (315 U. S. at 52–53 [emphasis added]):

The law which by statute determines the Government's liability is that of the place *where the negligent act or omission occurred* [citing 28 U. S. C. 1346 in a footnote]. This fertilizer was manufactured in Iowa and Nebraska, thence shipped to Texas. Speculation *as to where the negligence occurred* is unnecessary, since each of these jurisdictions recognizes the general proposition that a manufacturer is liable for defects in his product which could have been avoided by the exercise of due care.

The opinion, in a further footnote, then cites and briefly discusses cases from Texas, from Iowa and from Nebraska on the question. Manifestly, had the Justices agreed with the contention made in the present case by appellees, there would have been no occasion to discuss Iowa or Nebraska law. They would have said that the matter was to be determined by reference to Texas law alone, the place where the explosion occurred. The fact that they went out of their way to determine Iowa and Nebraska law indicates acceptance of this Court's view on the question.

We suggest that Mr. Justice Jackson's statement in the dissenting opinion in *Dalehite* with reference to the question of the applicable law under the Tort Claims Act—a question directly in issue there—is of much greater significance than his dissenting remarks (urged on this Court by appellees, Pet. pp. 15, 19) in *Wells v. Simonds Abrasive Co.*, 345 U. S. 514, 520, a case which was earlier than *Dalehite* and which did not involve the Federal Tort Claims Act.

**If Virginia law is not applicable, the case must be remanded
for further proceedings**

Appellees argue that if Virginia law is applicable, then its conflicts rule must be accepted, and that, they say, would refer us to the law of the place of injury, which appellees assume is the District of Columbia. The argument, if accepted, would in effect embrace the *renvoi* doctrine. That doctrine, however, has little support in this country. See 1 *Beale on Conflict of Laws*, pp. 55-57; cf. *Restatement of Conflicts*, § 7 (b). In any event, here again the explicit language of the Tort Claims Act, given its ordinary meaning, precludes abandoning the law of "the place" where the act or omission occurred. The Act's point of reference is the internal law of that state, not its conflicts rule which may carry us to the law of another state, which, in turn, may invoke the law of still another state; coming to rest finally in a situs other than "the place where the act or omission occurred."¹⁰

Throughout appellees petition is the assumption that the "tort", the "impact", the injury, and the death in this case occurred in the District of Columbia. They fail to distinguish between the place of the impact of the two planes, the place of injury, and the place of death. It does not necessarily follow from the record at trial that the situs of all three was the same. The trial judge made no findings to that effect and an issue of such importance to the case should not be taken for granted. Appellees' decedents may not have been injured by the impact of the P-38 on the DC-4. Rather, their fatal injuries may have occurred when the DC-4 struck the ground. In that event, if they were in the part of the DC-4 which fell in Virginia, as distinguished from the part that fell in the water in the District, the tort reached fruition in Virginia, and even under the general conflicts rule Virginia law would apply. If

¹⁰ The cases cited by appellees (Pet. pp. 29-30) for the proposition that the Virginia death statute cannot apply to an injury occurring in another jurisdiction do not involve a situation in which the wrongful act occurred in Virginia causing an injury or death in another jurisdiction. Accordingly, they are not in point.

the appropriate law to be applied is not the law of the place of the negligent act, but instead, the general conflicts rule, it is necessary to remand the case for further proceedings to resolve these questions. In our main brief on appeal (pp. 56-57, and fn. 117) we indicated other important factual questions which must be answered if the present issue is to be resolved by reference to the general conflicts rule. We believe, however, as we there stated, that Congress has foreclosed the matter by prescribing a different rule in the Act. That rule requires application of the Virginia law.

CONCLUSION

For the reasons stated, it is respectfully submitted that appellees' petition for a rehearing be denied.

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MAY 1955.

APPELLEES' PETITION FOR REHEARING IN BANC
OR BY ORIGINAL DIVISION AND
BRIEF IN SUPPORT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,017 and 12,018

UNITED STATES OF AMERICA, *Appellant,*

v.

UNION TRUST COMPANY, ET AL., *Appellees.*

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,017 and 12,018

UNITED STATES OF AMERICA, *Appellant*,

v.

UNION TRUST COMPANY, *et al.*, *Appellees*.

**APPELLEES' PETITION FOR REHEARING IN BANC
OR BY ORIGINAL DIVISION.**

Appellees respectfully petition this Court to grant a rehearing *in banc* or, in any event, by the division which heard the case, for the reasons stated in this Petition and in the supporting brief attached hereto.

The unanimous opinion of the division which heard this case, affirmed the judgment below holding the United States liable in the air crash of November 1, 1949. But the majority, in a brief statement relayed through the opinion of the dissenting judge, held that notwithstanding (1) that the trial judge found the collision occurred in the District of Columbia, and (2) that the established conflict of laws rule would therefore apply District of Columbia law, the

literal language of the Federal Tort Claims Act required the application of Virginia law (\$15,000 wrongful death limit) because the "act or omission" which caused the deaths occurred in Virginia.

Although the argument now sustained by the majority of the division was raised in appellant's original brief, appellees—though misguidedly it now appears—passed the point in their brief with an abbreviated discussion of the established conflicts rule and the legislative history of the Federal Tort Claims Act which then appeared and still appears conclusively contrary to the view adopted by the majority.

Upon further detailed research and consideration of the question at issue, this counsel is unreservedly convinced of the error of the majority. To prevent manifest injustice and an erroneous construction of a vital federal statute, the entire bench should hear and consider the matter. More specifically, a rehearing, preferably *in banc*, though at least by the original division, is strongly urged because:

1. The judgment here, in contrast to the ordinary case, directly affects the lives and fortunes of more than 200 surviving next of kin of those who died in the air crash (since these cases, by stipulation, control determinations of liability in all of the wrongful death actions growing out of the crash).

2. Notwithstanding the high incidence of petitions for rehearing, this counsel firmly believes that the majority of the division has grievously *erred* (a) in holding that the Act is explicit, and (b) in holding that a literal interpretation requires the conclusion reached. Appellees' position is that the Act is not explicit but requires interpretation although not literal translation. But even if a literal interpretation is made, this Court wrongly interpreted the literal words of § 1346(b). The words "act or omission" appear twice in that section, the first time prefaced with the adjectives "negligent or wrongful". The first reference is the legislative waiver of previous government im-

munity from tort suits. The second reference defines the standard to apply to claims for which liability is created. And, as to the latter, the statute expressly requires that the Government be held liable "under circumstances where the United States, *if a private* person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred". Thus, even were the statute to be construed solely by its literal language, that language requires that if, under the law of the place where the negligent actor stood, his liability is judged by the standards applicable in the place (or state) where his *act* injured another, then in such circumstances the liability of the United States is likewise to be determined by the law of the place of injury. Beyond this, however, the alleged literal (though erroneously literal) reading of the statute by the majority of the division does violence to the history and purposes of the Tort Claims Act and leads to absurd results. Also, if the measure of liability is determined by the extent of liability of "a private person", by "the law of the place where the act or omission occurred", even then D. C. law would apply because Virginia law requires that the law of the place of injury be applied.

In short, whatever legal, logical or historical approach is taken, the majority's construction, we are unalterably convinced, comes to a 180 degree wrong conclusion. And this, if the Court will bear with counsel in the supporting brief, we firmly believe will be so demonstrated even to the satisfaction of the open minded division which sat on the case. Trite but pertinent, we respectfully suggest, is a paraphrase that "To err is human, to reconsider divine".

3. The question involved is one of general importance. It has never been directly decided before, and it vitally affects the application of probably the most extensively litigated federal statute on the books today. By reason of the increasing frequency in modern life of so-called multi-state torts (where activities originating in one state oc-

casion injury in another), resolution of this question will necessarily directly affect the outcome of considerable litigation under that statute.

4. Because of the number of affected parties and the far-flung future effect upon this much used federal legislation, the decision here is of far greater importance than issues of purely local concern sometimes considered by the Court sufficiently important for rehearing. In one of such cases this Court ordered a rehearing *sua sponte* (*Hannah v. Fletcher*, No. 12050, originally argued in December 1954, rehearing ordered *per curiam* for April 1, 1955).

5. Because the majority opinion is not reported, except by brief reference by the dissenting judge, neither the entire Court nor counsel nor future litigants can determine whether the conclusion reached is well founded. In view of the substantial importance of the question, all are entitled to a full and clear explanation of the pertinent reasoning.

For the foregoing reasons, it is strongly urged—and with the greatest conviction of which counsel is capable—that a rehearing is necessary here and should be granted, either *in banc* or by the original division which heard the case.

Respectfully submitted,

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I, DAVID G. BRESS, one of counsel for appellees, do hereby certify that the foregoing Petition for Rehearing is filed in good faith and not for delay.

DAVID G. BRESS.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,017 and 12,018

UNITED STATES OF AMERICA, *Appellant*,

v.

UNION TRUST COMPANY, ET AL., *Appellees*.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

I.

THIS COURT HAS ERRONEOUSLY INTERPRETED § 1346(b).

1. THE COURT'S OPINION.

The only opinion was written by Judge Miller, and the only part we are concerned with on this Rehearing is his dissent appearing on two pages, from p. 34 to p. 36. Those two pages contain the basis for modification of the judgment. The majority of the Court did not write an opinion. However, we do have, in Judge Miller's dissent, his statement of the majority's view.

A. Basis for Judge Miller's Dissent.

The judgment in No. 12,017 was modified by reducing the recovery from \$50,000 to \$15,000 by applying the

limited recovery provisions of the Virginia death statute where the deaths did not occur, instead of the District of Columbia statute which the trial court held to be applicable. The dissent states that the majority interpreted the language of § 1346(b), "the law of the place where the act or omission occurred", to mean the "law of the place where its *negligent employee's act* or omission occurred." Judge Miller's dissent states his interpretation is that this part of the section means "*the law of the place where the tort occurred*". (Opinion, p. 35) What reasons the majority relied upon are not disclosed.

We, of course, agree with Judge Miller and with the reasons given for his interpretation. If his dissent had stated all the reasons for construing the section as we contend, then rehearing by the division might not be indicated because presumably the reasons would have been considered and overruled by the majority. Although Judge Miller's view is correct, there are other persuasive and potent reasons supporting his conclusion which have not yet been called to the Court's attention and are not mentioned in the opinion, and these should reasonably cause this Court, because of the great importance of the question, to rehear and reconsider, either *in banc* or in division. Appellees' study of the question is now more comprehensive than in their original brief where the present question was treated summarily (Appellees' Brief 104-107). We believe we can now be of considerable aid to the Court in evaluating the Government's contention and the supposed reasons for the majority's ruling. We submit that upon further consideration of the additional analysis and authorities cited in this brief, the opinion of the Court should be modified to adopt the conclusion announced by Judge Miller. Judge Miller's reasons may be summarized as follows:

1. The clause in § 1346(b) "where the act or omission occurred" is the legal equivalent of "*where the tort occurred*" and that is the sense in which Congress used it.

(If that ordinary meaning were not intended, something would have been said in the statute or in its long legislative history. Neither says anything about it. The problem of Congressional intent will be further discussed, *infra*.)

2. The word "act" in the sense used in the statute has no legal significance separate from the consequences of the act. And when the law of the place of the act is to be ascertained, legally that place is where the force of the act impinges—or where the impact of the act takes effect. The act of sending messages includes "their immediate consequences".

3. The Restatement, Conflict of Laws (1934) § 377, has been uniformly followed by the courts and represents the accepted general rule that "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

4. The legislative history contains the significant testimony of Assistant Attorney General Francis Shea, then head of the Claims Division, Department of Justice, before the House Committee on the Judiciary in which he answered certain questions concerning the proposed legislation, indicating that the place where the "*act or omission occurred*" meant the place where the "*injury or damage*" occurred. The fact that he was referring to the venue provisions of § 1402(b) is of no consequence as pointed out by Judge Miller.

B. The Silent Majority Admits the General Conflicts Rule.

The dissent says at page 34:

"The general conflicts rule disregards the place of the negligent act or omission and, instead, uses the law of the place where the injury was sustained. My brothers Edgerton and Fahy are of the view that the trial court erred in applying the general rule here because the Tort Claims Act provides in § 1346(b) that . . ."

This quotation makes it unnecessary to present in any detail the extensive authorities establishing with almost unanimous acclaim the so-called general rule of conflicts making the law of the place of injury the controlling law in multi-state torts and not the place where the wrongdoer acted.¹

¹ That general rule is the rule adopted by the Restatement § 377. "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." In multi-state torts where an act or omission occurs in one state and takes effect in others, the law of the state where the force impinges controls on the theory that the tort is not complete until the victim is hurt. Where a bullet is shot across a state line: *Cameron v. Vandergriff*, 53 Ark. 381, 13 S. W. 1092; *Dallas v. Whitney*, 118 W. Va. 106, 188 S. E. 766; *Kristansen v. Steinfeldt*, 300 N. Y. S. 543, rev. in 9 N. Y. S. (2d) 790. Where goods are negligently made in one state and sold in another: *Openbrier v. General Mills*, 340 Pa. 167, 16 A. 2d 379. The decisions in the Federal Courts have uniformly adopted this view. *Reed & Barton Corp. v. Maas*, 73 F. 2d 359; *McGrath v. Helena Rubenstein, Inc.*, 29 F. Supp. 822; *Hunter v. Derby Foods*, 110 F. 2d 970; *Mannsz v. Macwhyte Co.*, 155 F. 2d 445; *Anderson v. Linton*, 178 F. 2d 304. The case at bar is the first departure we have found.

The general rule has been applied to interstate libels, *Campbell v. Willmark Service System*, 123 F. 2d 204. To same effect is interstate fraud and deceit: see, *Iasigi v. Brown*, 17 How. 183, 194 (1854), and more recently to defamation *O'Reilly v. Curtis Pub. Co.*, 31 F. Supp. 364; *Hartmann v. American News Co.*, 69 F. Supp. 736; *Hartmann v. Time, Inc.*, 166 F. 2d 127, cert. den. 334 U. S. 848; and privacy *Sid's v. F-R Pub. Corp.*, 113 F. 2d 806. In *Gautier v. Pro-Football, Inc.*, 106 N. Y. S. 2d 553, the New York privacy statute was applied to a television broadcast originating in Washington, D. C., and heard in New York. In *Donahue v. Warner Bros. Pictures, Inc.*, 194 F. 2d 6, the Utah privacy statute was applied to a film made in California and shown in Utah.

In *Reed & Barton Corp. v. Maas*, *supra*, Wisconsin law was held to apply to a Massachusetts manufacturer who negligently made a coffee urn which injured the plaintiff in Wisconsin even though the suit was brought in the Federal Court in Massachusetts.

In *Hunter v. Derby Foods*, *supra*, where defendant shipped a tin can of corned beef from New York to Ohio where plaintiff ate it and died, it was held that the cause of action arose in Ohio.

In *Campbell v. Willmark Service System*, 123 F. 2d 204, where defendant mailed a defamatory report from Pennsylvania to New York, the New York law determined whether the report was libelous and not Pennsylvania law where it originated.

Maritime law has been applied to injuries at sea caused by a defendant's negligent act committed on land. *The S. S. Samovar*, 72 F. Supp. 574; *McDonald v. Cape Cod Trawling Co.*, 71 F. Supp. 888.

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The essence of the majority's holding (as gathered from the dissent) is that § 1346(b) is clear and unambiguous in its use of the phrase "law of the place where the act or omission occurred." Beyond that we are at a loss to know what the majority held. Did the majority consider the legislative history? Or did they believe the language to be so clear and explicit that reference to the legislative history was neither permitted nor necessary? If the legislative history was considered, did the majority limit its consideration to only that part mentioned in the dissenting opinion without the additional history that came into existence in 1948? Or did the majority consider and disagree with the *dicta* in the Supreme Court of the United States and several Circuit Courts of Appeal expressing their views on the applicable law in actions under the Act? These questions and others leave shrouded in uncertainty the precise reasons for the majority's ruling, and illustrate the frustrating result produced when an appellate court, in a case not appropriate for *per curiam* opinion, does not express the reason for its decision. Notwithstanding this uncertainty, counsel will try to demonstrate to this Court, *in banc* or in division, that whatever may have been the reasons for the majority's interpretation of § 1346(b), the resulting interpretation is wrong for every reason that can be used as a basis for testing its meaning.

2. AS A MATTER OF STATUTORY CONSTRUCTION "THE LAW OF THE PLACE WHERE THE ACT OR OMISSION OCCURRED" MEANS THE LAW OF THE PLACE OF IMPACT.

The majority admit the general rule of conflicts and that a contrary result would follow from its application here but probably imply that Congress intended to disregard that rule and the policy upon which it is based. It might

See also: *Kiefer v. Blue Seal Chemical Co.*, 196 F. 2d 614 (C. C. A. 3, 1952); *Smith v. Pennsylvania Central Air Lines*, 76 F. Supp. 940.

In *Howser v. Pearson*, 95 F. Supp. 936 (D. C. D. C. 1951) a radio broadcast originating within the District of Columbia and heard in 8 other states was held to create rights under the laws of the various states where it was heard.

also be that the majority believe the language so clear that any evidence of legislative intent or purpose should be ignored. To adopt a literal interpretation of the statute would be contrary to what Congress intended to accomplish. Or if it is said Congress had no intent at all, the result to be thus achieved would be contrary to sound legal doctrine which it must be assumed Congress meant to follow.

A. Legislative History.

There is not a shred of evidence in more than 30 years of legislative history behind the Tort Claims Act to support, even by innuendo, this Court's holding that Congress intended to discard rather than follow the universally accepted conflicts rule that the law of the place of the tort determines the nature and extent of the liability for it. On the contrary, there is affirmative evidence that Congress intended, as stated by Judge Miller, that "the legislative expression 'in accordance with the law of the place where the act or omission occurred' was intended to mean and therefore should be construed as meaning 'in accordance with the law of the place where the tort occurred'".

In *U. S. v. Dickerson*, 310 U. S. 554, 84 L. ed. 1356, the Court held that the meaning to be placed upon an Act of Congress must be derived from every relevant aid to construction, and overruled the respondent's contention that because the language was plain and unambiguous other aids to construction may not be utilized. The Court there quoted from *U. S. v. Fisher*, 2 Cranch. (U. S.) 358, 386, 2 L. ed. 304, 313 that "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." In *Dickerson* the Court also said (p. 562):

"It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the

customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. See *Boston Sand & Gravel Co. v. United States*, supra (278 US at 48, 73 L. ed. 177, 49 S. Ct. 52). The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

(a) *The Testimony of Asst. Attorney General Shea*

One piece of affirmative evidence was called to the attention of this Court and is mentioned in the opinion, and that is the testimony of Assistant Attorney General Shea before the House Committee on the Judiciary wherein he said that suit is required to be brought "in the locale of the injury or damage" in referring to venue in relation to "place where the act or omission occurred." (See Opinion, pp. 35-36).²

²In addition to the quotation from the testimony of Assistant Attorney General Shea reported in the pamphlet covering the 1942 hearings cited in footnote 18 on page 35 of the opinion, a further examination of the same pamphlet is enlightening and shows that the local law applicable to the case is the same law which would apply in suits between private persons. On page 26 of the cited hearings there is contained a report from the Department of Justice submitted by Assistant Attorney General Shea which states:

"... The liability of the United States in such cases is to be the same as that of a private individual, subject to the limitations of the bill, and is to be determined under the local law except that no punitive damages, interest, or costs may be assessed against the Government. Local law is to govern not only the matter of liability but also such defenses as contributory negligence, aggravation of damages, and the like, and the beneficiaries entitled to distribution of the recovery in death cases. . . ."

And on page 27:

"... Conformance to local law is called for by H. R. 6463, not only in respect of the merits of the claim but also in respect of the availability of defenses and the distribution or disposition of the recovery in cases of death. . . ."

Again, in his testimony, at page 30, Mr. Shea, in answer to a question by Congressman Celler dealing with the applicable law, stated:

"I should think the earlier bill would probably be construed as apply-

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The interpretation of the language by Assistant Attorney General Shea was particularly probative because he was the man charged with administration of the statute in the Claims Division of the Department of Justice.³ As said by the Supreme Court in *U. S. v. American Trucking Association*, 310 U. S. 543, 549, 84 L. ed. 1345, 1354:

“The Commission and the Wage and Hour Division, as we have said, have both interpreted § 204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve ‘contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.’ Furthermore, the Commission’s interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions’ enactment to Congress.”

(b) *The 1948 Amendment*

The other piece of affirmative evidence has not previously been called to the attention of this Court but has recently been uncovered in the legislative history of the 1948 amendment of the Federal Tort Claims Act.⁴ That amendment deals with the measure of damages in wrongful death cases and provides that

“in any case wherein death was caused where the law of the place where the act or omission complained of

ing the local tort law, but this bill specifically covers it, leaving the distribution in case of death and so forth to the local law.”

It was clearly manifest that the test of liability was the same as that of a private person. Reference was made to the Government’s operation of the railroads in World War I, where “Congress placed the Government’s responsibility on the same plane as that of a private operator, in respect to property damage or loss, and personal injury or death.” Report, page 38, citing Act of March 2, 1918, 40 Stat. 456; Act of September 7, 1916, 39 Stat. 728. See also: *Director of Railroads v. Kastenbaum*, 263 U. S. 25, 68 L. ed. 146.

³ See reference to his testimony in *U. S. v. Spelar*, 338 U. S. 217, 221, 94 L. ed. 3, 7.

⁴ Act of June 25, 1948, Chap. 646, 62 Stat. 983.

occurred, provides, or has been construed to provide, for damages only punitive in nature the United States shall be liable for actual or compensatory damages in lieu thereof."

House Report 748 relating to this amendment (H. R. 3690) indicates that its purpose was to correct the conflict between the wrongful death statutes of Alabama and Massachusetts, where recovery of punitive damages was permitted, and the prohibition against punitive damages under the Tort Claims Act. The amendment provided for recovery against the Government under the wrongful death statutes of Alabama and Massachusetts limited only to compensatory damages instead of the punitive type permitted by those state statutes. The House and Senate Reports⁵ on the amendment were therefore concerned with cases involving suits against the Government in which those two statutes would be controlling. That was the single problem there involved. Both reports separately state in the same language:

"Under the Federal Tort Claims Act, a claim for a death caused by the wrongful act of a Government employee shall be brought in the United States District Court for the District where the wrongful act occurred and the United States is expressly relieved from liability for punitive damages.

Each case is determined in accordance with the law of the state where the death occurred." (Italics ours.)

This amendment sought to grant to the people of two states the right of action already granted to the people of the other 46. This makes it entirely self evident that the law of the "place where the act or omission occurred" refers only to the place where the injury or death occurred; otherwise, the quoted language from the reports would be meaningless. If the House and Senate reports both say that the law governing the Government's liability is "the law

⁵ House Report No. 748, 80th Congress, 1st Session, Vol. 4, June 20, 1947; Senate Report No. 763, 80th Congress, 1st Session, Vol. 4, July 25, 1947.

of the state where the death occurred" that must mean, and can mean nothing else, that Congress itself considered that to be the meaning of § 1346(b) adopted two years before. This is especially so because Congress was here specifically dealing with correcting an inequity that resulted from depriving claimants of a remedy against the United States simply because their decedents were killed in Alabama and Massachusetts. Because Congress was here specifically dealing with the problem of what law shall apply its answer to that specific problem should be persuasive.

It is not realistic to state that Congress was not aware that the actor could have acted in one state and the injury or death occur in another state. Multi-state torts have been the subject of litigation for many years as is apparent from the many citations to such cases in this brief. If Congress was aware of the multi-state feature, then this piece of evidence of the legislative history inevitably indicates that Congress believed that the law governing the recovery of damages for wrongful death would be "determined in accordance with the law of the state where the death occurred", not the law of the state where the act or omission occurred if that was a different state. On the other hand, even if it be assumed that Congress was not aware of the multi-state feature, then the language "act or omission" must necessarily refer to the place where the injury occurred. As a practical matter, if Congress did not have multi-state torts in mind during this legislation, then obviously its use of the language in question could not have been intended or be construed to have intended to discard the established conflicts rule applicable to multi-state torts.

B. § 1346(b) Contains Ambiguities Requiring the Application of Established Principles of Statutory Construction—Not Literal Interpretation.

It is appellees' submission that Congress used the language "the law of the place where the act or omission oc-

curring" to mean the law of that place that would determine a private person's liability for the same kind of "act or omission". And that in turn means the law of the place of impact because that is the law that determines a private person's liability. Since the statute is clear that the Government, with some expressed exceptions, was waiving its immunity and taking upon itself the same liability that a private person would have, the least that can be said in favor of the existence of an ambiguity is that Congress must have kept in mind the well accepted rules of law controlling the liability of private persons. If Congress was aware that those rules determining the liability of a private person included a rule that "the law of the place where the wrongful act or omission occurred" is determined by the law of the place where the impact occurs (and that is what the Assistant Attorney General had in mind when he testified before the Congressional Committee),⁶ then certainly there is an ambiguity or a lack of sufficient explicitness to warrant inquiry into the legislative history and purpose of the statute. It is essential to do so to arrive at the intent of Congress—and then it should be so construed as to give effect to that intent, even if it collides violently with the apparent meaning of the words out of the context of their history and purpose.

⁶ In *Wells v. Simonds Abrasive Co.*, 345 U. S. 514, 97 L. ed. 1211, Mr. Justice Jackson said, in a dissenting opinion referring to the rule that the law of the place where the "injury occurred" or "the law of the state of injury" governs, that is "what is probably the best settled rule of conflicts in tort cases". He then added:

"The existence and justice of this principle is recognized by its adoption as the policy of federal law. The Federal Tort Claims Act makes the basic test of the Government's liability whether a private person 'would be liable to the claimant . . . in accordance with the law of the place where the act or omission occurred.'"

He then quoted from Mr. Justice Holmes in *Western Union Tel. v. Brown*, 234 U. S. 542, 58 L. ed. 1457, that:

"It is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery."

The dissenting opinion quotes the pertinent part of § 1346(b) and, referring to the silent majority, states that "they hold that Congress thus provided in *explicit* terms" that the Government's liability is measured by the law of the place where the negligent employee's act or omission occurred and accordingly the Virginia law applies because the negligent employees here were in the control tower in Virginia. This probably means that the majority did not find it necessary to apply the established principles of statutory construction because they found the statute to contain "explicit terms". We disagree and believe there are ambiguities which require the application of recognized rules of statutory construction. There is no basis for the majority holding, which we infer from the next sentence in Judge Miller's opinion, that Congress "had in mind the general conflicts rule . . . and intended to make it inapplicable in situations such as this." We have studied the legislative history of the Act and every Supreme Court case decided under it and we can find no shred of support for attributing to Congress an intent to make the general rule of conflicts inapplicable. If the majority means that this intent is attributed to Congress on the theory the language of the section is "explicit" and free from ambiguity, this section points out the error in that belief.

The first part of § 1346(b) provides that the Government shall be liable in damages for "*the negligent or wrongful act or omission of any employee of the government . . .*" This is followed by the next clause which provides that the Government's liability shall depend upon whether a private person would be liable to the claimant "in accordance with the law of the place where the act or omission occurred." The word "act" in the latter reference has a meaning different from the words "negligent or wrongful act" in the former. The former is the declaration of the broad principle of liability of the Government for the negligent and wrongful acts and omissions of its employees. However, in the latter reference to "act or omission" the extent and measure of responsibility is intended to be covered. That

feature is introduced by the reference to the liability of a private person by the law of the place where the "act or omission occurred", meaning the extent to which a private person would be liable for the same act of his employee. This second reference to "act or omission" does not speak in terms of the Government employee's act or omission but rather of liability of a private person for such act of the employee who is privately employed. Thus, the latter use of "act or omission" was designed to determine what liability a private person would incur. The Government's liability would then parallel or equal that private person's liability. And if we determine that the private person's liability for the acts of his employees in the tower in Virginia causing a collision in D. C. is measured by D. C. law where the tort occurred, then the Government's liability is equally to be measured by D. C. law.

If a New York resident is injured in the District of Columbia by a Government plane negligently serviced in California, it is our view that the liability of the Government should be determined by the law of the District of Columbia. Also, that plaintiff should have the right to sue in the District of Columbia as the place where the act occurred and not have to go to New York or California to sue.

It strains the statute to say that the word "act" in the statute does not mean the act of collision or impact. That would be its ordinary legal meaning as already discussed, particularly in view of the legislative history. Further, it should be noted that earlier in the same section the word "negligent or wrongful act" is used as referring to the conduct of the employee or actor. If the draftsman intended that the word "act" in the last clause refer to the "negligent or wrongful act" of the earlier clause he would have repeated the words "negligent or wrongful" or would have used the word "such". Not having done so, we have further justification for interpreting it in its legal sense of *impact* as distinguished from the literal translation of a layman.

The least that can be said about the meaning of "the place where the act or omission occurred" is that it is ambiguous. And if the ambiguity creates some doubt as to what place was intended, that doubt should be resolved by resort to established common law doctrine. See comment 56 Yale L. J. 534, 553, where it is suggested that applicable common law doctrine be applied. This would require application of the general rule of conflicts which, in turn, would require the application of the law of the District of Columbia and not Virginia.

Since the language here to be construed may in one sense refer to the conduct of the actor at the place where that conduct occurs and in another refer to the entirety of the act which includes its effect or impact in a different place, resort to principles of statutory construction is required. Beale Conflict of Laws § 65.1-66.1.

Rules of statutory construction require resort to the intention of Congress. The literal language of a statute does not determine its meaning where the literal meaning is either not consistent with the legislative intent or would lead to absurd results. *Monomotor Oil Co. v. Johnson*, 292 U. S. 86, 78 L. ed. 1141; 3 Sutherland, *Statutory Construction* (3d ed.) § 4701.

The statute must be construed as a whole in the light of the purpose sought to be achieved by it. And the intention of the whole statute controls the meaning of any particular part. It must be construed with reference to its manifest object.

"In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and contention will prevail over the strict letter."

1 Kent's Commentaries (13th ed.) 462. To same effect see 3 Sutherland, *Statutory Construction* § 4706:

"While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words."

3. LITERAL INTERPRETATION PRODUCES ABSURD RESULTS AT VARIANCE WITH THE PURPOSE OF THE STATUTE AND CONTRARY TO THE LANGUAGE OF ANALOGOUS CASES IN OTHER COURTS.

The purpose of the Federal Tort Claims Act, in terms of the condition which it sought to correct, was "to grant to private individuals a right to sue the Government in respect to such torts as negligence in the operation of vehicles." Senate Report No. 1400, 79th Cong. 2d Session (1946) 31. The object was to abolish immunity in a field such as auto operation where an act was invariably accompanied by an "impact" if any "tort claim" was to arise. Any act or omission to act creating a "tort claim" cannot be considered as something in a vacuum separated from the impact feature. And that is precisely what Congress was dealing with: liability for an impact or an "injury or damage" to use the language of Assistant Attorney General Shea.⁷ That this was the real purpose of the statute is further demonstrated by the fact that its emphasis is upon protecting the injured plaintiff in accordance with the law of the place where he happens to be at the time of his injury.⁸

The law is well settled that even where the language of a statute appears clear, the legislative history may be resorted to in determining the legislative purpose if the words of the statute taken literally and out of context might produce a result at variance with the purpose of the statute. *Feres v. U. S.*, *supra* fn. 8; *U. S. v. Public Utilities Commission*, 345 U. S. 295, 314, 97 L. ed. 1020, 1037. In the latter case, the Court said:

"Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion. And that method of determining congressional purpose is likewise ap-

⁷ See *supra*, p. 11.

⁸ *Feres v. United States*, 340 U. S. 135, 95 L. ed. 152. *Wells v. Simonds Abrasive Co.*, 345 U. S. 514, 97 L. ed. 1211.

plicable when the literal words would bring about an end completely at variance with the purpose of the statute.”

If the majority should say that § 1346(b) is not ambiguous and its language so clear that reference to the legislative history is not proper, attention should then be invited to *Boston Sand & G. Co. v. United States*, 73 L. ed. 170, 278, U. S. 41, 48, where Mr. Justice Holmes said:

“It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists.”

The Supreme Court of the United States admonished that the sovereign’s waiver of immunity must be liberally construed so as to give full effect to the purpose of the Act. *United States v. Aetna Casualty & Surety Co.*, 338 U. S. 366, 94 L. ed. 171. *United States v. Yellow Cab Co.*, 340 U. S. 543, 95 L. ed. 523.

In *Cox v. Roth*, _____ U. S. _____, 99 L. ed. (Advance, p. 190) decided January 10, 1955, the estate of a deceased seaman sued for damages for wrongful death under the Jones Act which gave to seamen the same rights granted to railway employees under the Federal Employers’ Liability Act. On the problem of statutory construction the Supreme Court said:

“As the Court said in *Markham v. Cabell*, 326 U. S. 404, 409, 90 L. ed. 165, 168, 66 S. Ct. 193, ‘the policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes. . . . *The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve*’ ”. . . .

“The Jones Act ‘as welfare legislation . . . is entitled to a liberal construction to accomplish its beneficent purposes.’ ” (Italics ours.)

Since the legislative purpose was unquestionably to make the Government liable to the same extent that a private person would be liable for the same kind of act or omission, it defeats the purpose of the statute to declare that Congress did not articulate that intent in clear enough language. As Mr. Justice Holmes once said, on circuit, in *Johnson v. U. S.*, 163 F. 303:

“The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.”

To the same effect is *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, 83 L. ed. 784, which upheld the right to sue the R. F. C. although the statute creating it did not expressly waive governmental immunity.

The literal interpretation of § 1346(b) will produce results so utterly at variance with the purpose of the statute as to warrant this Court's reconsideration of the legislative history in the light of the purpose of the statute.

If the governing law is to be the law of the place where the negligent Government employee acts as distinguished from the place where his act takes effect, many abnormal, absurd and impossible results would follow. A few hypothetical cases will be illustrative:

1. If the Government should negligently release a guided missile from its base at Guantanamo, Cuba, and it should strike and kill the plaintiff in the District of Columbia, (a) the Government would not be liable because the “act” occurred in a foreign country (*U. S. v. Spelar*, 338 U. S. 217, 94 L. ed. 3) and (b) even if the Government were liable, notwithstanding *Spelar*, its liability for a death in D. C. would be governed by the law of Cuba even though the language of the District of Columbia death statute is applicable to deaths resulting from injuries in the District of Columbia. Such a result would also do violence to the

express language used in *Feres, supra*, where it was recognized that the applicable law is the law of the place where one chooses to be at the time of injury.

2. Suppose an Air Force plane on a flight from California to Washington, D. C. is negligently serviced in California, Colorado and Kansas and by reason thereof crashes and kills the plaintiff in the District of Columbia. Apart from the reasons in *Feres* for applying the D. C. law (see above), a further reason is that the law of the places of the negligent acts may be different from each other, and these differences may relate to problems of liability or damages or both. For example, in death cases California has no limit on amount of recovery, whereas Colorado's limit is \$10,000 and Kansas \$15,000. In Colorado the action must be brought by the surviving widow whereas in California and Kansas it must be brought by the personal representative. Additionally, to impose upon plaintiff the burden of proving what part of the negligence occurred in each of the 3 states would be an impossible task. And if the law of the place of the crash determines whether *res ipsa loquitur* applies, (see cases *infra*) how would that be applied where that differs from the law of the several jurisdictions where the "acts or omissions" occurred. Is it reasonable to believe that Congress intended such impossible results?

3. Suppose a Navy drone plane controlled by a Navy aircraft carrier at sea is negligently caused to fall in Washington. Or, suppose the drone was controlled from Harmon Field, Newfoundland (the same air base involved in *U. S. v. Spelar, supra*). What law governs? Suppose the fall was due to the Navy's negligent manufacture of certain parts for the drone at the Naval Air Station at Pensacola, Florida, or Norfolk Naval Air Station in Virginia. Should Florida or Virginia law apply to a District of Columbia death? Should the same death afford no relief because the Government is not liable for its acts or omissions at Harmon Field? Should the Death on the High

Seas Act apply to the death of a man who never left the territorial confines of the District of Columbia?⁹

In *Olson v. U. S.*, 175 F. 2d 510, a South Dakota resident was killed in a Utah accident and the administratrix sued the Government in South Dakota. In holding that the administratrix's right to sue was determined by the wrongful death statute of Utah where the accident occurred, the Court said:

"Under the Act . . . the district court for the district in which the plaintiff resided had jurisdiction of the action but *the standards and tests of the state where the accident occurred controlled* on questions of negligence and the nature and extent of recovery including the capacity and rights of the plaintiff and the liability of the United States. State of Maryland to use of *Burkhardt v. U. S.*, 165 F. 2d 869; *Van Wie v. U. S.*, 77 F. Supp. 22; *Washabaugh v. U. S.*, 83 F. Supp. 623". (Italics ours.)

Although in *Olson* there was no multi-state tort involved and the trial judge had erroneously applied the law of the forum, the language is indicative of an acceptance by the Court that the general rule of conflicts was not discarded by the Tort Claims Act.

In *U. S. v. Praylou*, 208 F. 2d 291, plaintiff's barn in South Carolina was damaged by the fall of a Government plane. The Fourth Circuit in an opinion by Chief Judge Parker, in the clearest of terms, held that the Government was liable to plaintiff under the absolute liability provisions of the Uniform Aeronautics Act in effect in South Carolina where the injury occurred and overruled the contentions of the Government that the local law should not apply. Had specific negligence been proven to have occurred in Virginia and the crash later followed in S. C., the law and place of injury would still have applied. The Court said:

"There can be no question, we think, but that the federal tort claims act was intended to cover cases in-

⁹ See *Lacey v. Wiggins Airways, Inc.*, *infra*.

volving liability of this sort. As we said in *State of Maryland to use of Burkhardt v. United States*, 4 Circ., 165 F. 2d 869, 871, 1 A. L. R. 2d 213: 'Congress was creating a liability not theretofore existing on the part of the government. To have defined all of the tort rules under which liability could be established would have been an almost impossible undertaking; but *standards of liability were necessary and Congress was compelled, as a practical matter, to adopt the principles and standards of local law in defining them.*' As pointed out in that case, one of the principal purposes of the legislation was to eliminate the necessity for the passage of private acts, which had consumed so much of the time of Congress; and it is not consonant with such purpose that Congress should have intended to exclude from the coverage of the act liability arising from operations of the sort here involved merely because under state law the liability for injury was made absolute and not dependent upon negligence. Equally *absurd* would be the conclusion that Congress intended that there should be liability in the states where liability under state law is based on negligence, and no liability in the great majority of the states which have adopted the Uniform Aeronautics Act. It is no answer to this to say that the Government would be liable for negligence but not subject to the absolute liability in states having the uniform act; for in those states the absolute liability is the only one that the law prescribes. Furthermore, to hold that in those states the government would be liable only on a showing of negligence whereas private individuals are held to the absolute liability of the statute would be contrary to the requirement of 28 U. S. C. § 2674 that the United States shall be liable 'in the same manner and to the same extent as a private individual under like circumstances' ". (Italics supplied.)

The Court is clear in its view that *res ipsa loquitur* as declared by South Carolina would apply in the absence of proof of specific negligence. This plainly implies that the law of the place where the injury occurs is the sole controlling test without regard to the law of the state where the negligent employee acted.

Another case in the Fourth Circuit equally emphatic in its application of the law of the place of injury is *D'Anna v. U. S.*, 181 F. 2d 335, where an auxiliary gas tank fell from a Navy plane while engaging in a demonstration over Baltimore and injured the plaintiff. The tank had been attached at Quonset Point, R. I., preparatory for the trip to Baltimore. The evidence tended to show negligent attachment. The Court applied the law of Maryland where the injury occurred.¹⁰ That law applied the doctrine of *res ipsa loquitur* making the owner of a plane *prima facie* liable for injuries to persons on the ground. This gave the plaintiff the benefit of a presumption of negligence under Maryland law which defendant would be required to rebut.

There are other *res ipsa loquitur* airplane cases which have held the Government liable under the Tort Claims Act. The very application of the doctrine assumes that the law of the place of injury controls. The doctrine arises because of the unusual act of a plane dropping something or falling. The doctrine is not concerned with the negligent employee's conduct at a place different from where the consequences of his conduct took effect. As a matter of fact, it is obvious that in many cases the plaintiff would be unable to prove his case and the United States, consequently would not bear the same liability as private persons if the *res ipsa* rule were not to apply. Yet if the place of the "act or omission" is (in multi-state torts) a place different from the place of injury, it would be impossible to prove where the act or omission occurred which, indeed, is often the reason for application of the *res ipsa* rule.

¹⁰ In the brief filed in that case by the Government on February 28, 1950, the Government's position there was exactly opposite to its position here, because it stated at page 7: "The Federal Tort Claims Act (Section 1346(b)) provides that in suits against the Government, the Government shall be liable or not liable to the claimant in accordance with the law of the State of Maryland, the place where the accident occurred," and it then cites *Burkhardt v. U. S.*, 165 F. 2d 869, holding that § 1346(b) means that the law of the place of injury determines the nature and extent of the Government's liability.

In *Lacey v. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. C. Mass., 1951) plaintiff's intestate was killed when the airplane he was piloting crashed on the high seas as a result of engine failure due to defendant's failure to inspect on land. The only negligent "act or omission" was alleged to have occurred while the craft was on land. The question was whether the plaintiff was entitled to recover under the Death on the High Seas Act (46 U. S. C. A. § 761), which provided for recovery "whenever the death of a person shall be caused by wrongful act, negligence, or default occurring on the high seas." The defendant contended that the Act did not apply because defendant's wrongful act or omission occurred on land. The court stated that to recover under the Act the wrongful act, neglect, or default must have occurred on the high seas. The court then held that the act on land did not really become a legal act until it took effect, stating:

"When the statute speaks of 'wrongful act, neglect, or default occurring on the high seas' it contemplates the *substance* of the occurrence which resulted in death and gave rise to a right to recover. The substance of the occurrence here was not merely the act or omission to act attributable to the respondent, while the craft was on land. If the respondent failed to make a proper inspection of the craft . . . the effect of such failure was not spent until the plane fell to the sea . . . The wrongful act was consummated wholly upon the water where the victim met his death." (*Italics ours.*)

The same principle was announced in two decisions in the Supreme Court of the United States: *Smith & Son v. Taylor*, 276 U. S. 179, 72 L. ed. 520, and *Vancouver Steamship Company, Ltd. v. Rice*, 288 U. S. 445, 77 L. ed. 885. In *Smith v. Taylor*, plaintiff's decedent was killed on land when struck by a hoist sling operated from a ship alongside a wharf. The Court held that the law of the place where decedent's injury was sustained (on land) governed as against the law of the place of the wrongful actor (on water). The Court said:

"The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death. . . . The substance and consummation of the occurrence which gave rise to the cause of action took place on land."

In the *Vancouver* case, the plaintiff's decedent was also injured by a similar sling while he was on board ship as distinguished from being on land. He was removed to land after his injury where he later died, and the question was whether the law of the place where he was injured controlled. The Court following the principle of *Smith v. Taylor, supra*, held that the law of the place where the negligent act took effect controlled and therefore applied the law of admiralty.

4. THE MAJORITY'S DECISION IS CONTRARY TO THE SUPREME COURT DECISION IN *FERES v. U. S.* REAFFIRMED IN *U. S. v. BROWN* (DEC. 6, 1954) WHERE THE *LEX LOCI DELICTI* WAS HELD TO BE CONTROLLING.

The Supreme Court of the United States in *Feres v. United States*, 340 U. S. 135, 95 L. ed. 152, interpreted the pertinent language of § 1346(b) to mean the place where the claimant is at the time he is injured. The Court was there dealing with the question whether a soldier injured on duty was entitled to sue under the Tort Claims Act. In reaching a decision that he was not, solely because of his status as a soldier on active duty at the time of injury, the Court stated that had he been on furlough at the time of injury the decision would have been otherwise (as in *Brooks v. U. S.*, 337 U. S. 49, 93 L. ed. 1200) because the furlough injury was not of the service-incurred type covered by other federal legislation. The Court made it clear that the governing law is the law of the place where the person is at the time of injury. In reaching this conclusion, Mr. Justice Jackson emphasized that the tort committed by the Government is controlled by the law of the place where the injured claimant is at the time of his injury just as it would be in the case of a private defendant.

The Court no doubt was fully aware of the multi-state character of torts in modern society and that the same law determining the liability of a private person under similar circumstances would determine the liability of the Government. Mr. Justice Jackson said:

"It is not without significance as to whether the Act should be construed to apply to service-connected injuries that it makes '... the law of the place where the act or omission occurred' govern any consequent liability. 28 USCA § 1346 (2) (b), FCA title 28, § 1346 (2) (b). This provision recognizes and assimilates into federal law the rules of substantive law of the several states, among which divergencies are notorious. This perhaps is fair enough when the claimant is not on duty or is *free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury. That his tort claims should be governed by the law of the location where he has elected to be is just as fair when the defendant is the Government as when the defendant is a private individual.* But a soldier on active duty has no such choice and must serve any place or, under modern conditions, any number of places in quick succession in the forty-eight States, the Canal Zone, or Alaska, or Hawaii, or any other Territory of the United States.'" (Italics ours.)

We do not contend that the decision in *Feres* is any more than strong *dictum* on the question here involved. But since the Court was fully aware of the multi-state tort problem, and in view of the vast number of Government personnel for whose acts the Government would be responsible, the Court's observations as to governing law is not to be lightly set aside. The sentences in italics are clear and free of ambiguity. If the governing law, in either case where the defendant is a private person or the Government, is to be determined by the claimant's *choice of location* at the time of his injury, then that law must necessarily be the law of the place where the impact occurred and not where the force was started in motion. The impact can only take place where the plaintiff is physically

located at the time. Therefore, the governing law must be the law of the place where the force impinges or takes effect. The claims referred to must be claims resulting from acts of violence, as distinguished from libel, slander and the other types of non-physical torts all of which are excepted from the operation of the Act.

In *U. S. v. Brown*, ... U. S., 99 L. ed. (Advance p. 125) decided on December 6, 1954, the Court upheld the right of a veteran to recover damages under the Tort Claims Act for the negligence of a Veterans Administration Hospital in treating his knee which he had injured 2 years previously while on active duty. The Government contended for a rule of non-liability in tort because the veteran had received an award under the Veterans Act (48 Stat. 526, 38 U. S. C. § 501(a)) for his original knee injury as well as for the same hospital incurred injury. The Court, in a most liberal application of the Tort Claims Act and reaffirming its decision in *Feres*, allowed recovery and referred "to the broad pattern of liability which the United States undertook by the Tort Claims Act." And implicitly recognizing the governing *lex loci delicti*, the Court observed: "Certainly this claim is one which might be cognizable under local law if the defendant were a private party."

II.

THE VIRGINIA DEATH STATUTE CANNOT APPLY TO AN INJURY IN THE DISTRICT OF COLUMBIA RESULTING IN DEATH.

The Virginia death statute applies only to deaths resulting from injuries sustained in Virginia. *Betts v. Southern Ry. Co.*, 71 F. 2d 787; *Maryland v. Coard*, 175 Va. 571, 9 S. E. 2d 454. In the *Betts* case, *supra*, referring to the Virginia death statute, Parker, C. J., said:

"In the first place, there is no question but that all matters pertaining to the substantive right of recovery under a wrongful death statute, including the right to recover, the nature of the right, and the party in whom it is vested, are governed by the law of the state where

the injury resulting in death occurred. *Ormsby v. Chase*, 290 U. S. 387."

Even if the tortfeaser were in Virginia when he committed the act causing injury out of the state, Virginia's death statute would not be applicable because the statute has been held to have no extraterritorial effect and applies only to deaths resulting from injuries inflicted on persons in Virginia. *Withrow v. Edwards*, 181 Va. 344, 25 S. E. 2d 343.

And since the Government's liability under the Tort Claims Act is to parallel that of a private person, the Government could not be liable under Virginia law for a District of Columbia death because no private person could be liable under the Virginia death statute for a District of Columbia death. The District of Columbia death statute must therefore apply.

III.

EVEN IF VIRGINIA LAW APPLIES, THAT LAW INCLUDES THE VIRGINIA CONFLICTS RULE WHICH REQUIRES THAT THE LAW OF THE PLACE OF INJURY (DISTRICT OF COLUMBIA) BE APPLIED.

Even if the majority adhere to a literal interpretation of the Tort Claims Act requiring that Virginia law must govern the extent of the Government's liability, it is the *entire* Virginia law, including its conflicts rule, which must be applied. The Virginia conflicts rule requires Virginia to recognize the law of the place where the collision occurred, hence the District of Columbia law must be applied here.

In tort cases Virginia uniformly applies the law of the place where the injury was inflicted—the *lex loci delicti*. A Virginia case dealing with the choice of law problem is *Baise v. Warren*, 158 Va. 505, 508, 164 S. E. 655 (1932), which was a suit for damages in Virginia for injuries sustained in an automobile accident in North Carolina, and the court held that the law of North Carolina controlled.

This rule has been consistently followed by the Virginia courts.¹¹ In the case of *Lachman v. Pennsylvania Greyhound Lines*, 160 F. 2d 496 (4 Cir. 1947) the plaintiff was injured in Maryland on a bus en route from New York to Norfolk. In an action brought in a Federal district court in Virginia the court stated:

"... the federal court in a diversity case follows the law of the state in which it sits. It thus seems clear that plaintiff's substantive rights in the instant case will be governed by the law of Maryland, since *it is well settled in Virginia that liability for tort depends upon the law of the place of injury.*" (Emphasis added.)

The Supreme Court of the United States in overthrowing the 95-year reign of *Swift v. Tyson*, 16 Pet. 1, (1842), said in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 78, 82 L. ed. 1188 (1937):

"... the law to be applied in any case is *the law of the state*. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of Federal concern. There is no Federal general common law." (Emphasis added.)

Following this decision, there was considerable doubt as to the *quantum* of law contained within the words, "the law of the state". Did this mean the internal law only, minus the conflict of laws rule of a state, or did the Supreme Court mean *all of the law of the state*, including its conflicts rule? The Supreme Court chose the latter alternative and resolved all doubt in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U. S. 487, 85 L. ed. 1477

¹¹ *Sutton v. Bland*, 166 Va. 132, 184 S. E. 231 (1936) (accident in North Carolina; Virginia applied North Carolina law); *C. I. T. Corporation v. Guy*, 170 Va. 16, 195 S. E. 659 (1938) (Virginia refused to apply South Carolina statute to Virginia accident); *State of Maryland v. Coard*, 175 Va. 571, 9 S. E. 2d 454 (1940) (accident in Maryland; Virginia applied Maryland law); *Taylor v. Taylor*, 189 Va. 753, 53 S. E. 2d 820 (1949) (accident in Florida; Virginia applied Florida "guest statute").

(1941) where it required that Federal Courts apply the conflicts rule as part of "the law" of the state in which they sit. See also *Griffin v. McCoach*, 313 U. S. 498, 85 L. ed. 1481 (1941) decided the same day as the *Klaxon* case, *supra*.

In addition, there are decisions under the Tort Claims Act which sustain the view that the Federal Courts should interpret the words "the law" in Sections 1346(b) of the Act to include the state's conflict rule. Thus, in *Landon v. United States*, 197 F. 2d 128 (2nd Cir., 1952) the plaintiff, employed in New Jersey, was injured by a Post Office Department truck in New York while acting in the course of his employment. In a suit in New York against the United States under the Tort Claims Act, the Court held that the *entire* New York law where the injury occurred, applied, including its conflict of laws rule, which rule required that the law of the place of performance of a contract (here New Jersey) should control the effect to be given to the compensation terms of plaintiff's arrangement with his employer in New Jersey. Thus, the Second Circuit, in a Tort Claims Act case, looked not only to the internal law of New York but also to New York's conflicts rule in the ultimate determination of the applicable law.

Also in the Fourth Circuit, where the Government was sued under the Act for the negligent marking of a wreck in Chesapeake Bay which resulted in the sinking of plaintiff's ship, the critical question was whether admiralty law or common law governed. Under the latter, contributory negligence would be a complete defense; under the former, comparative negligence would permit recovery. The Court looked to the entire Virginia law, including its conflict of laws rule, and decided that the comparative negligence doctrine of admiralty should govern. *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (4th Cir., 1951).

It is, therefore, respectfully submitted that if Congress intended that § 1346(b) have a literal application of "the law of the place where the act or omission occurred," it intended that *all* "the law" of that place be applied, including Virginia's conflict of laws rule, in the same manner that the Supreme Court of the United States directed the application of the conflicts rule in *Klaxon, supra*. In any event, there is certainly no evidence of intent to exclude the application of a state's conflicts rule. Accordingly, if Virginia law is applied here, as ruled by the majority, then *all* of Virginia law should apply and not only a part to the exclusion of its conflicts rule. To exclude the Virginia conflicts rule would not only result in an unnatural extraterritorial extension of the Virginia death statute into the District of Columbia, but would also result in a new measure of liability which departs from the statutory imposition of liability "if a private person would be liable. . . ."

CONCLUSION.

Since there is not an iota of evidence that Congress intended to depart from the established rule that the place of an act or omission is, in law, where the act or omission takes effect, but, to the contrary, since there is substantial evidence that Congress intended to follow that rule, § 1346(b) should be interpreted so as to apply here the law of the District of Columbia where the acts and omissions took effect in producing the deaths. But even if the majority adhere to their interpretation of § 1346(b) and apply Virginia law, that law requires that the rights of the decedents be determined under the District of Columbia death statute.

Accordingly, it is respectfully submitted that upon rehearing the result reached by Judge Miller's dissenting opinion be adopted so that the modification of the judg-

ment in No. 12,017 shall be set aside and the judgments below in both No. 12,017 and No. 12,018 shall be affirmed.

Respectfully submitted,

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

United States Court of Appeals
For the District of Columbia Circuit

*United States Court of Appeals
For the
District of Columbia Circuit*

Nos. 12,017 and 12,018

LEO JUN 15 1954

UNITED STATES OF AMERICA, *Appellant,*

Joseph W. Stewart
CLERK

v.

UNION TRUST COMPANY, ET AL., *Appellees.*

Appeal From The United States District Court
For The District of Columbia

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**United States Court of Appeals
For the District of Columbia Circuit**

Nos. 12,017 and 12,018

UNITED STATES OF AMERICA, *Appellant*,

v.

UNION TRUST COMPANY, ET AL., *Appellees*.

**Appeal From The United States District Court
For The District of Columbia**

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

Appellee's brief (p. 3) opens with the charge that the United States "in some degree" has slanted its statement of the case, promises that it will state "*all* the pertinent evidence regardless of whom it favors," and then proceeds with its own "highly selective and slanted approach to the record" (*id.*). The omissions and argumentative distortions are so numerous that it is wholly impossible to correct them here.¹ We mention this only to alert the Court to the danger of taking appellee's purportedly

¹ Random examples: Appellee discusses (Br. pp. 8, 19) the possibility of simultaneous tower transmission on two radio frequencies, but meticulously avoids reference to the testimony that, because the resulting decreased modulation might prevent the planes from receiving the messages and for other reasons, tower controllers were not supposed to do so (VII 1467A, II 244-7A). Appellee (Br. p. 11) recounts Bridoux's testimony that he asked Aubin to tell the tower of his test flight, that if trouble arose he would circle the field and if

"objective treatment of the entire record" (*id.*) at face value.

In the portion of its brief addressed to the Government's appeals, appellee's discussion of the governmental and discretionary function exclusions of the Tort Claims Act is characterized by numerous misleading or illusory statements,² by reliance upon cases whose precedential authority has time and again been rejected,³ and by a number of shopworn arguments which the Supreme Court and other Courts of Appeals have refused to accept. We shall endeavor to touch on these points only summarily. Second, we will briefly discuss appellee's argument as to the findings (its statement that the United States concedes tower negligence is wrong). And third, we will deal with Eastern's mistaken contentions as to the meaning of "cleared to land" and as to the respective responsibilities of pilot and tower.

necessary they should signal him by lights. But appellee does not disclose that when Aubin himself was called, he did *not* testify that he had so warned the tower of trouble or of the need for light signals (IX 1797-8A, 1786A, 1801A). Appellee states (Br. p. 14, fn. 12) that at no time did Bridoux fly in excess of 150 m.p.h. Appellee prefers to overlook Bridoux's own admission that he flew at 175-180 m.p.h. (II 413A). Appellee states (Br. p. 12, fn. 9) that when the P-38 radio was removed from the wreckage, "it was apparently in working condition". This has no record support whatever. And a reading of the complete testimony of the tower witnesses will disclose that appellee's violent attack upon them, based upon the perspective of hindsight, is far from warranted.

² Some of these will be discussed *infra*. Appellee also indulges in much obliqueness, thus, compare appellee's statement (Br. p. 75), frequently repeated in substance elsewhere in its brief (pp. 69, 77, 93) that the Act "is a broad *unlimited* waiver of sovereign immunity" (emphasis ours) with the Supreme Court's statement that, "That Act waived sovereign immunity from suit for certain specified torts of federal employees. It did not assure injured persons damages for all injuries caused by such employees" (*Dalehite*, 346 U.S. 15, 17). Compare appellee's statement (Br. p. 78) that neither *Dalehite* nor *Feres* "support the argument that 1346(b) and 2674 bar claims arising from Governmental activities" and its statement that (Br. p. 75) the "*only*" boundaries on the waiver of immunity is that defined by section 2680, with the Supreme Court's language in *Feres* and *Dalehite* (quoted in part at U.S. Br. p. 21, fn. 28) to the effect that sections 1346 (b) and 2674 preclude liability of the United States if the circumstances cannot be analogized to those in which private liability would arise. Compare appellee's statement that, except as limited by 2680(a), the Act was an "effort to waive sovereign immunity for *all* governmental acts *per se*" (Br. p. 74; emphasis theirs) with the Supreme Court's observation that, "Uppermost in the collective mind of Congress were the ordinary common-law torts. Of these, the example which is reiterated * * * is 'negligence in the operation of vehicles.'" 346 U.S. 28.

³ *Cerri v. United States*, 80 F. Supp. 831 (N.D. Cal.) and *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (C.A. 4), both discussed *infra*, pp 6-7.

I. CONCERNING GOVERNMENTAL AND DISCRETIONARY FUNCTIONS.

A. *The scope of the exclusion.* (1) In our main brief we noted that the provisions of the Tort Claims Act, its legislative history, and the decisions of the Supreme Court and of other courts, all demonstrate that the Act does not permit the imposition of liability upon the United States for an assertedly negligent performance of a "governmental" or "discretionary" function. We emphasized that the United States assumed liability only "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674, and see sec. 1346 (b)). This restriction to the liability of a "private" person in "like circumstances", whether read alone or in conjunction with the provisions of Section 2680 (a), precludes recovery when the claims arise out of activities undertaken in a special governmental context or in any circumstances differing markedly from those in which comparable private activities are carried on. We think this proposition is now settled beyond any question. *Dalehite v. United States*, 346 U.S. 15, 43-44; *Feres v. United States*, 340 U.S. 135, 141-142; *In re Texas City Disaster Litigation*, 197 F. 2d 771, 780 (C.A. 5), *aff'd sub nom. Dalehite, supra*; *National Mfg. Co. v. United States*, 210 F. 2d 263, 276-277 (C.A. 8), certiorari denied subsequent to filing of our main brief, 22 U.S. Law Week 3303 (May 17, 1954); *Indian Towing Co. v. United States*, 211 F. 2d 886 (C.A. 5, April 22, 1954); *Sigmon v. United States*, 110 F. Supp. 906, 910 (W.D. Va.).⁴

⁴ We have previously quoted some of the pertinent language of the *Feres* and the majority *Dalehite* opinions with regard to this point (U.S. Br. p. 21, fn. 28). Even the dissenting opinion in *Dalehite* agreed that when an official "is acting in a way in which no private person could", the claim is excluded from the coverage of the Act. (346 U.S. at 59). It should be noted, moreover, that Mr. Justice Jackson, who wrote the dissent in the *Dalehite* case, authored the Court's opinion in the *Feres* case. Appellee's contention (Br. p. 78) that *Feres* is restricted to the situation in which the claimant is otherwise covered by compensatory legislation ignores *Dalehite's* restatement and application of the *Feres* language that the Act "is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence." 340 U.S. at 141. Nor can the *National Mfg. Co.* case, *supra*, be catalogued simply as a flood control case (App. Br. pp. 92, 95). The

Indian Towing Co., supra, is the most recent case directly in point. It was decided by the Fifth Circuit subsequent to the filing of our main brief. The case is of unique importance here not only because of the closely analogous factual situation but also because of the identity between the arguments pressed on appeal. There, suit was brought under the Tort Claims Act for damage resulting from the grounding of a tug. The complaint alleged that the grounding and the loss were due to the negligence of specified Coast Guardsmen in their maintenance of a lighthouse on Chandeleur Island, Louisiana; that because of their negligent inspection and servicing of the light, it failed to operate properly; and that the Coast Guard was negligent in not warning mariners, who used the light for navigational purposes, that it was not functioning. The Government moved to dismiss the complaint, thus admitting the allegations, and the district court granted the motion, citing *Dalehite* as controlling. Plaintiff appealed.

The Government's argument on appeal was precisely parallel to the one we make here, *i.e.*, that the Coast Guard maintains aids to marine navigation as part of its general public duty (just as the CAA maintains control towers as an aid to air navigation); that this is a characteristically governmental function without any private counterpart;⁵

Eighth Circuit stated as an independent basis for dismissal (210 F. 2d at 277):

When the two sections [2674 and 2680(a)] are read in relation, as they must be, it becomes clear that Congress intended to prohibit imposition of liability upon the United States for activities undertaken by the United States in circumstances that are not like but differ in essential character from those in which any comparable private enterprises are carried on. "The Act did not create new causes of action where none existed before." If the activity is purely governmental there can be no liability under the Act which by its terms is conditioned on the liability of a private individual in like circumstances.

⁵ The Government's brief on appeal (pp. 8-9) pointed out that the Coast Guard maintains some 38,000 navigational aids, such as lighthouses, lightships, buoys, etc.; that while there are over 3,300 so-called "private" aids to navigation (*e.g.*, buoys, beacons, lights, etc.) erected and serviced by private industry or municipal and state agencies, such "private" navigational aids can be established and maintained only upon authorization of the Coast Guard and under Coast Guard regulation. (See, *Aids to Marine Navigation of the United States* (U.S.C.G.—193, 1949), pp. 28-29; 14 U.S.C. 83; 33 C.F.R. 1949 Ed., §§ 66.01-1—66.01-35). The close identity of this situation to the "private" airport control towers is obvious. See U.S. Br. pp. 30-32.

that Sections 2674 and 1346(b) of the Tort Claims Act, as construed by the Supreme Court in *Feres* and in *Dalehite*, bar recovery under the Act. Plaintiff, on the other hand, just as appellee does here, stressed and quoted at great length from *Foley v. State of New York*, 294 N.Y. 279, 62 N.E. 2d 69,⁶ from *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (C.A. 4),⁷ and also extensively from that part of the *Dalehite* decision to which appellee here refers (Br. pp. 96-7).⁸ Plaintiff's argument was essentially the one appellee advances in the instant case, viz., that by voluntarily establishing a navigational aid which the Government knows will be relied on by others for purposes of safety, the Government is liable in tort for negligence in its operation.⁹

The Fifth Circuit affirmed the dismissal in a *per curiam* opinion, the brevity of which, we think, indicates how insubstantial the Court regarded plaintiff's arguments. After stating the facts, the Fifth Circuit said:

The United States filing a motion to dismiss, the motion was sustained on the authority of *Dalehite v. U.S.*, 346 U.S. 15.

Appealing from the order, appellants are here insisting that the facts alleged as ground for recovery here do not bring the case within the facts of, or the reasons for, the decision in the *Dalehite* case while appellee [United States] as vigorously insists that that decision and the decision in the *Feres* case are controlling here.

⁶ Appellant's Supplemental Brief on Appeal, pp. 3-4, filed in *Indian Towing Co.*, C.A. 5, No. 14,747.

⁷ Appellant's main brief, pp. 7-9, C.A. 5, No. 14,747.

⁸ *Ibid.*, pp. 12-14.

⁹ Indian Towing Co. asserted in its main brief (pp. 15-16): "Here is a case where the Government using its discretion determined that a lighthouse was necessary for safe navigation. Once the lighthouse was established, there was an absolute duty, which was not in any sense a discretionary governmental function, namely, to maintain that lighthouse. Otherwise, it was a trap to every vessel and every mariner navigating those waters. They had a right to rely upon the lighthouse, unless there was some extraordinary act of God which put the light out or made it impossible to keep burning. The negligence of a named Coast Guard officer whose duty it was to see that the lighthouse was kept in repair was in no sense similar to what happened in the Texas City disaster."

We are of the clear opinion that this is so, and that, under the principles, governing the liability of the United States under the invoked act, laid down in those cases, the judgment must be affirmed.¹⁰

(2) In contrast to these recent, authoritative and judicially unquestioned holdings, appellee's denial of the governmental function exception is footed only on the *Cerri* and the *Somerset Seafood* cases, *supra*. The first is an early district court ruling pre-dating *Feres*. The portions of this district court opinion which appellee quotes (Br. pp. 76, 77) are totally inconsistent with the Supreme Court's language in *Feres*, 340 U.S. at 141-2, and in *Dalehite*, 346 U.S. at 43-44. *Somerset Seafood*, on the other hand, was decided by the Fourth Circuit prior to *Dalehite*. The relevant parts of its opinion, too, which adopt the *Cerri* statements quoted by appellee here (193 F. 2d at 635), simply cannot be regarded as authoritative when compared with the Supreme Court's language. Additionally, *Somerset Seafood* may be distinguished on its facts.¹¹ Fur-

¹⁰ It is significant that of the three Circuit Judges who heard the *Indian Towing Co.* case (Hutcheson, Ch. J., Borah and Holmes), the first two named had filed the dissenting opinion in the *Texas City (Dalehite)* case when it was before the Court of Appeals (197 F. 2d 771, 782). It will be recalled that the Fifth Circuit sat *en banc* on that appeal. In holding that under the Tort Claims Act the United States could not be liable for the negligence of the Coast Guard, the majority opinion declared that, "There are no functions of private individuals comparable to those with which the Coast Guard is charged by statute," and pointed to the language of 28 U.S.C. 1346(b) and 2674 as well as to the *Feres* decision to show that, as a prerequisite to imposing liability on the United States, the claimants must show analogous private liability in like circumstances. 197 F. 2d at 780. The dissenters there, like the Justices who dissented when the case came to the Supreme Court, did not disagree on this aspect of the case. In both courts the dissenters would have imposed liability, not because of the defalcation of the Coast Guard in connection with its regulatory functions which have no private parallel, but on the ground that the United States, as a manufacturer of a dangerous product, should be held liable just as a private manufacturer would be liable. 197 F. 2d at 786; 346 U.S. at 53, 60.

¹¹ The *Somerset Seafood Co.* sued for damages for the sinking of its ship resulting from the Coast Guard's negligent marking of a wreck. The United States was the original owner of the wrecked ship. The initial duty of removing or marking a wrecked ship, as the Court of Appeals noted, rests upon the owner until abandonment of the ship. After abandonment, the duty devolves upon the Coast Guard, under the Wreck Acts, 33 U.S.C. 409, 736, 14 U.S.C. 86. Thus, while we think that *Somerset Seafood* was incorrectly decided and has been disapproved *sub silentio* by the Supreme Court, it is arguable that the liability there imposed upon the United States had an analogous private counterpart.

thermore, *Somerset Seafood* was forcefully urged by counsel upon the Eighth Circuit in the *National Mfg. Co.* case, but was not accepted; it was stressed in the *Indian Towing Co.* case in the Fifth Circuit, but was not accepted; and, more important, it was heavily relied upon by petitioners in *Dalehite v. United States*, but was not accepted there. Actually, as we have already shown, each of these cases reached a result directly contradictory to *Somerset Seafood* on this point.¹²

(3) Appellee argues that the governmental or discretionary function exception applies only to policy and planning decisions of a legislative and executive character and not to any operational functions.¹³ This very argument was similarly advanced by counsel but not accepted by the courts in the *National Mfg. Co.* and *Indian Towing Co.* cases. Indeed, the Supreme Court denied a petition for rehearing in *Dalehite* (346 U.S. 841) despite a contention that the "necessary implications of the *Dalehite* opinion" are "that even so-called operational details of an act might" be discretionary functions.¹⁴

That the *Dalehite* decision cannot be so narrowly confined is clearly demonstrated by the part of the opinion which deals with the negligence of the Coast Guard (346 U.S. at 42-44), and appellee's attempt (Br. p. 98) to discount this part of the opinion is footless and deceptive. Appellee states that in *Dalehite* the Coast Guard was merely charged with the failure to promulgate regulations and the failure to fight fire, but the fact is that the findings of negligence in that case went much further. The Supreme Court noted that the Coast Guard was also found

¹² In the petition for certiorari (pp. 11, 14-15) in the *National Mfg. Co.* case, Supreme Court, Oct. T. 1953, No. 660, petitioners stressed that there was a conflict between that decision and *Somerset Seafood*. Certiorari was nevertheless denied. 22 U.S. Law Week 3303 (May 17, 1954).

¹³ Much of appellee's thesis is charted in a note in 66 Harv. L. Rev. 488 (Jan., 1953). This note, mentioned by appellee (Br. p. 76, fn. 56) as having criticized the Supreme Court's *Dalehite* decision, was written *before* the decision in that case. The note follows very closely and advances the same basic contentions which were advanced by petitioners in *Dalehite* and which were there rejected by the Supreme Court.

¹⁴ See Memorandum Supplementing Petition for Rehearing filed in the Supreme Court in *Dalehite v. United States*, No. 308, Oct. T., 1952, p. 3.

negligent "in failing to police the shipboard loading" and in "failing to supervise the storage of the FGAN" (346 U.S. 23-24, 42).¹⁵ Appellee conveniently ignores these findings because, obviously, exemption from liability for the negligent performance of such governmental functions is inconsistent with, and underscores the fallacy of, appellee's argument that only high echelon planning and policy level functions fall within the governmental or discretionary function exception. Like the air traffic controllers, Coast Guardsmen who supervise shipboard loading and who enforce existing safety standards and policy laid down by higher echelon officials, do not themselves adopt or promulgate regulations. In appellee's language (Br. p. 82), they "act at the operational level." But, as *Dalehite* holds, these activities are characteristically governmental, have no private counterpart, and therefore cannot give rise to liability of the United States under the Tort Claims Act.

The basic error in appellee's reliance upon the policy-operational-level language in *Dalehite* is its failure to recognize that there the Court was discussing that phase of the case which seemingly had a private counterpart, viz., the negligent manufacture and bagging of a dangerous product. Where the government's activity has a private counterpart, then it is necessary to inquire whether the negligent acts were discretionary acts within the meaning of Section 2680(a). In that connection the Court observed that although the employees at the operational level did not themselves exercise any discretion or independent judgment, because each of their acts looked upon as negligence was specifically directed by a "plan" (346 U.S. 38-39), the plan itself was made by their superiors in the exercise of their judgment and discretion (346 U.S. 35-36). This alone brought the discretionary func-

¹⁵ The district court's Findings of Fact in *Dalehite* are not officially reported. They appear in Vol. 2, pp. 882 *et seq.*, 830 *et seq.*, of the printed record filed in the Supreme Court, Oct. T. 1952, No. 308. They also include numerous findings that the Government was negligent in failing to enforce compliance with *existing* statutes and *existing* Army, Coast Guard and I.C.C. safety regulations (*ibid.*, pp. 898, 836-842 [latter citation refers to Plaintiffs' Requested Findings which the district court expressly adopted, *id.* p. 900]).

tion exception into play: the non-discretionary "acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable" (346 U.S. 36). In the case at bar, however, the acts of the traffic controllers were themselves discretionary acts. (U.S. Br. pp. 44-50). And it is important to note that the Supreme Court did *not* limit the discretionary function exception merely to high level policy judgment and deny it to discretionary acts at the operational level. On the contrary, it set out *verbatim* petitioners' argument on that very point, which is almost identical with appellee's argument here, and then refused to accept the limitation, saying, "It is unnecessary to define, apart from this case, precisely where discretion ends" (346 U.S. 35).¹⁶ On the other hand, in dealing with the Coast Guard, the Court had before it an activity which was characteristically governmental, and once that was evident it became unnecessary to undertake the inquiry discussed above. Thus, the Court refused even to consider the findings of Coast Guard negligence. "We do not enter into an examination of these factual findings. We prefer, again, to rest our decision on the Act. * * * Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§ 1346 and 2674." 346 U.S. 42-43. Similarly, in the instant case, there is no occasion to inquire into the findings of negligence because the purely governmental nature of the activities of the control tower—regulating and controlling air commerce—compel the conclusion that appellee's claims are without the Act. But if the inquiry is necessary, then as our main brief demonstrates (pp. 33-50), the assertedly negligent acts were discretionary acts.¹⁷

¹⁶ A number of cases illustrating that the discretionary function exception is not limited to high level policy decisions are set out in our main brief, p. 45, fns. 101, 102.

¹⁷ Appellee's further attempt to distinguish *Dalehite* from the case at bar on the ground that in *Dalehite* the court merely applied "a well-recognized common law immunity" for fire fighting patently ignores the equally well established common law immunity for negligent regulation of traffic (see U.S. Br. pp. 37-41). Nor is it any answer to say that the cases supporting the latter proposition arise in states in which sovereign immunity has not been waived, because that is just as true of the fire fighting cases. (And in *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E. 2d 704, recovery was denied despite

(4) Frequent reference in appellee's argument to the governmental—proprietary dichotomy familiar in the area of municipal tort liability is nothing but a carefully contrived straw man. We have never urged that either Section 2674 or 2680(a) was intended to retain in full measure that dichotomy. See U.S. Br. p. 35, fn. 76. On the contrary, we have always recognized that, to cite one example, the Act applies to the negligent operation of a government vehicle, irrespective of whether that vehicle was being employed in connection with a governmental or proprietary function. What we have urged, instead, is that Section 2674 prohibits the imposition of liability for the assertedly negligent performance of the governmental function *itself*.¹⁸ The legislative history confirms our position (see U.S. Br. p. 23, fn. 31), and the Supreme Court, by holding in *Feres* and *Dalehite* that recovery under the Act is conditioned upon the existence of an analogous private liability, has also concurred in the view.

B. *Concerning appellee's contention that control tower activities are not governmental functions.*—Appellee contends that the regulation of air traffic by the control tower is not a characteristically governmental function because it really does not regulate, because the tower only has local effect, and because private airport operators (some of whom maintained their own towers before the United States undertook exclusive regulation of civil aeronautics) owe a common law duty to invitees. None of these premises supports appellee's conclusion.

(1) While conceding that the Government is not liable for claims arising out of regulatory activities (Br. p. 94), appellee contends that in supervising and controlling air traffic the tower operator is not engaged in a regulatory

a broad waiver of state immunity.) The essential fact is that the waiver of immunity of the United States does not extend to claims based upon performance of a governmental function, thus both classes of cases are appropriate authority here.

¹⁸ This marks the distinction between the numerous cases cited by appellee, Br. p. 78, fn. 58, and the case at bar. We are concerned here with a claim

activity, "for he adopts no rules for general application nor does he create standards. * * * [H]e merely acts at the operational level subject to pre-existing regulations * * *" (Br. p. 82). Thus appellee seeks to have this Court hold that the regulatory function ends when the written regulation is promulgated. Manifestly, the administration and enforcement of the regulation are an inseparable part of the regulatory activity. The official who grants or denies a license to an applicant does not himself adopt or promulgate the rules, but merely acts under pre-existing regulations, yet it could hardly be doubted that claims based on his negligent action would not be within the coverage of the Tort Claims Act (see U.S. Br. p. 23).¹⁹ And, as we have already noted (above, pp. 7-9), this very point was passed upon adversely to appellee's position in *Dalehite* where the Court excluded liability based upon the negligence of the Coast Guard in its policing of shipboard loading and in its negligent enforcement of various safety regulations. The Coast Guardsmen there were not adopting rules, but were acting in a regulatory capacity under standards previously laid down, just as appellee contends the air traffic controllers were doing in this case.

Appellee's bald assertion (Br. p. 83) that the air traffic controllers "have no enforcement authority whatsoever" and its seeming denial that violation of the controller's instructions is "subject to punitive or remedial sanctions" are grossly in error. At pp. 30, 47 of our main brief we cited, and appellee conspicuously avoids mentioning, the relevant provisions of the statute and regulations showing

arising from the governmental function *itself*, i.e., regulation of air commerce. Compare the situation, basically present in appellee's cited cases, in which a CAA auto negligently strikes a pedestrian. There, the gravamen of the complaint is not that CAA was negligent in the performance of its specific statutory function (regulation of air commerce). Indeed, insofar as that complainant is concerned, the manner in which CAA fulfills its specific function is immaterial to his claim. The Tort Act was designed to permit such a suit, but not, as in the instant case, where the gravamen of the claim is negligence in the performance of acts of government.

¹⁹ *Chournos v. United States*, 193 F. 2d 321 (C.A. 10), certiorari denied, 343 U.S. 977; *Matveychuk v. United States*, 195 F. 2d 613 (C.A. 2), cert. den. 344 U.S. 845. Cf. *Bertch v. State*, 193 Misc. 259, 83 N.Y.S. 2d 814; *Toyos v. State*, 181 Misc. 761, 47 N.Y.S. 2d 322.

the contrary to be true.²⁰ Indeed, appellee is so anxious to remove the tower operator from the category of regulatory activity that it goes so far as to say that the tower instructions "are only advisory and informational" (Br. p. 83, 7).²¹ If this relegates the issue simply to whether the United States is suable under the Tort Claims Act for the negligent dissemination or failure to disseminate gratuitous advice and information, then there are distinct grounds for holding that the Court has no jurisdiction over the claims, for the Act excludes "cases where mere 'talk' or failure to 'talk' on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States." *National Mfg. Co.*, *supra*, 210 F. 2d at 276, and see *id.* at 279-280; cf. *Jones v. United States*, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921. In any event, appellee's statement is only a half-truth. As we have already indicated (U.S. Br. pp. 30, 47-48), the pilot has no choice as to affirmative instructions from the tower—*such instructions must be obeyed* (the *only* exception is in an emergency situation). A landing clearance, on the other hand, is simply "permissive in nature" and the regulations place direct responsibility on the pilot for the safety and course of the plane in landing, not on the tower. See U.S. Br. p. 46, and see *infra*, pp. 17-21.

(2) Nor is there merit to appellee's contention that because their effect is essentially local, the activities of control towers are not characteristically governmental. Not every governmental function has a direct impact on every member of the public. Even where the activity is concerned primarily with the safety of particular people in a limited geographical area, and the very people intended

²⁰ The CAB has had frequent occasion to penalize pilots for violating tower instructions. Proceedings before the CAB are initiated upon charges by the tower operator formalized in a complaint filed by the Administrator of CAA. *E.g.*, *Rentzel v. Nadiak*, CAB Docket No. SR-2070 (May 12, 1950) (pilot's certificate suspended for 15 days because he violated tower instruction to "hold," *i.e.*, stop, on a taxiway); *Rentzel v. Herron*, CAB Docket No. SR-3-502 (March 21, 1950) (pilot's certificate suspended for 30 days because he violated tower instructions and failed to maintain contact with the tower). Cf. *Kuhn v. CAB*, 87 App. D.C. 130, 183 F. 2d 839.

²¹ Compare Eastern's position on this, discussed *infra*, pp. 17-19.

to be protected are injured through negligent performance of that function, the claim may be beyond the scope of the Tort Claims Act. To illustrate, operation of the lighthouse on Chandeleur Island was only for the protection of mariners navigating in the nearby waters, and the very persons intended to be safeguarded suffered damage. But because the function had no analogous private counterpart the claim was not actionable. *Indian Towing Co., supra*. Similarly, Weather Bureau employees charged with issuing flood warnings to people in the Kansas City area negligently miscalculated the imminence of the floods, and those who suffered loss were the very ones to whom negligent warnings were communicated. But because the activity was "purely governmental", the claims were barred. *National Mfg. Co., supra*. And in *Dalehite*, too, some of the activities involved were primarily concerned with the safety of particular members of the public. One of the findings there was that the Coast Guard was negligent because it ignored statutory "provisions for the safety of not only the vessels and cargo and persons on board, but those handling such [dangerous] substances and the public on such waters and on shore."²² Liability was nevertheless denied. Thus, the fact that the activity is essentially local in effect and primarily concerns the safety of particular affected persons (cf. App. Br. pp. 89-92) is irrelevant if, considering all the circumstances, there is no analogous private liability.

(3) Our earlier brief (pp. 33-34) answers appellee's argument as to a duty stemming from the fortuitous circumstance that the United States happens to own the National Airport.²³ Appellee's suggestion that the CAA tower oper-

²² Finding of Fact No. (u), Vol. 2 of *Dalehite* printed record, p. 897, on file in the Supreme Court, Oct. T. 1952, No. 308.

²³ Appellee errs (Br. p. 88) when it says that the control tower service "is paid for by those who land and take off at the airport." We are advised by CAA that at virtually all major airports (including Washington) carriers are customarily charged a nominal landing fee (about \$2.50 in 1949), perhaps analogous to an auto parking lot fee. But that fee is paid to the private airport operator alone, has no connection with the public services performed by CAA towers, is not accounted for or paid to CAA, and is charged whether or not there is a tower on the field. The control tower and other CAA navigational services, like the Coast Guard's and similar governmental activities, are undertaken gratuitously for the benefit of the public at large. See materials cited at U.S. Br. p. 31, fn. 66.

ators at all other airports are "lent servants" of the private airport operators, simply will not stand analysis. It is elementary that to determine that one is a lent servant it is necessary to establish that the borrowing master has the right to control and direct the servant's conduct. *Standard Oil Co. v. Anderson*, 212 U.S. 215; *Restatement of Agency*, §§ 227, 220. Clearly, no private airport operator has the right to direct the conduct of CAA tower operators in regulating air traffic.²⁴

(4) Having conceded, as it must, that claims arising out of the negligent performance of regulatory activities are excluded from the coverage of the Tort Claims Act, appellee necessarily must scuttle and abandon the precise ground upon which its own judgments are based, for that was the rationale of the trial judge's opinion below (I 44A). With admirable, but certainly abortive, agility, appellee now endeavors to transform its claim from one based upon the alleged negligent regulation of air traffic to something based upon the principles governing the liability of a Good Samaritan. The Government is liable, appellee states (Br. pp. 88-9), because, "having [voluntarily] assumed to act for the purpose of warning others and having led aircraft to rely thereon, it breached its resulting common law obligation to exercise reasonable care in the operation of the tower." (Cf. fn. 9, p. 5, *supra*.) The short answer is that the Good Samaritan doctrine can have no application to governmental activities. For, if it were adopted, then virtually every governmental activity would fall within its

²⁴ No private airport operator himself, as distinguished from the CAA tower, has the power today to control civil aircraft in air commerce, not even within the designated control zone surrounding his airport, for all navigable airspace has been placed in the public domain (49 U.S.C. 180; cf. *United States v. Causby*, 328 U.S. 256) and is subject to exclusive federal control (U.S. Br. pp. 24-30). Our earlier description of the intimate role of the control towers within the complex network of federal regulation of civil aeronautics makes it unnecessary to compare them, as appellee would (Br. p. 82), with the uncoordinated, legally impotent private towers of the 1930's. The only case we have found involving a private airport operator's liability for the non-functioning of a pre-CAA tower is *Finfera v. Thomas*, 119 F. 2d 28 (C.A. 6). There, a collision between taxiing planes occurred when the municipal airport tower failed to issue signals. Plaintiff-pilot's contention that he had a right to rely on the tower for such signals was rejected, and liability was denied, thus negating appellee's contention (Br. p. 84) re a "common law" tower duty.

reach, whether it be traffic control, police protection, fire fighting, health regulation, or any other activity undertaken by a government to protect the safety and security of its citizenry. Such activities are undertaken by the government voluntarily and with the knowledge and intention that the public will rely upon them. Their purpose, however, is to benefit the public at large, and it certainly is not contemplated that private actionable rights will be created in the event of negligent performance. Otherwise, the governing body would not only be held as an insurer of their perfect performance, but the potential liability could reach unpredictable magnitudes. We repeat the *Feres* and *Dalehite* admonition that the effect of the Tort Claims Act "is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." 346 U.S. at 43.

This argument, also, was presented to and rejected by the courts in the *Indian Towing Co.* case, the *National Mfg. Co.* case, and in *Jones v. United States*, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921. Cf. *Finfera v. Thomas*, *supra*. The opinion in *National Mfg. Co.* expressly held the railroad-flagman-type cases (which involve the private duty to warn and not the public duty to regulate), such as appellee relies on at Br. p. 87, entirely inapplicable. 210 F. 2d. at 278. Acceptance of appellee's argument here would not only conflict with these decisions of the other Courts of Appeals but would also collide with *Dalehite*.

II. CONCERNING THE FINDINGS OF FACT.

Both appellee (Br. pp. 103, 108) and Eastern (Br. pp. 65-6) totally pervert the Government's position when they state that the United States in effect concedes tower negligence.²⁵ We do *not* concede fault of the tower; on the contrary, we say that the ultimate findings—because of the

²⁵ They seek such a concession from a sentence at p. 5 of our brief, but they fail to observe that our words are a paraphrase and virtually a quotation from one of the trial judge's findings of fact (I 50A). It was in no sense a concession of the correctness of the finding. We find it difficult to believe that our attack on his findings could be construed as their adoption, especially since we argued at length as to the failure of the trial judge to specify the course, speed and rate of descent of each plane. See also our Statement of Points, Nos. 8 and 9, U. S. Br. pp. 15-16.

absence of findings "of the preliminary and basic facts"—are certainly inadequate for appellate purposes, and that, if the underlying evidence is examined, then the conclusion must be that the ultimate findings are clearly erroneous. (U.S. Br. 50-55). Our brief referred repeatedly to factors which demonstrate the error of the conclusionary findings. It is most significant, we think, that appellee has not attempted any direct answer to the points we made. To do so would have forced it to blow hot and cold at the same time, for, in urging (in Eastern's cases) that the jury verdict is supported by the evidence, appellee vigorously presses the very evidence which we contend establishes error in certain of the judge's findings. Thus, appellee (Br. pp. 3, 20, 46), like the Government, argues that the Shaw testimony proves that the DC-4 received a timely warning of the presence of the P-38; and, like the Government, appellee (Br. pp. 3, 44-52) stresses that the paths of the planes were such that the DC-4 pilots should have seen the P-38 without such warning. Hence, on the basis of these militant admissions by appellee, the trial judge's finding of tower negligence in its failure to give the DC-4 a warning concerning the P-38, is effectively removed from our case: appellee agrees with the Government that adequate warning was given or was unnecessary. Similarly, appellee argues vehemently that the tower never cleared the DC-4 to land (App. Br. pp. 3, 19-21, 39-44). This admission disposes of the finding that the tower was negligent in clearing both planes to land simultaneously, for appellee now says that only one plane was cleared.

Even without regard to these fatal admissions, we fail to see how appellee can take comfort from our supposed "failure to attack the sufficiency of the evidence" supporting the findings (App. Br. p. 103) when the point we make is much more fundamental, *i.e.*, that the trial judge failed to make any preliminary findings indicating the factual basis for the ultimate conclusions of negligence. In that connection, we are not seeking evidentiary detail, as appellee suggests (*id.*), but resolution of the conflict of evidence as to "the

respective positions of said planes in relation to each other and their speed of approach and descent." (I 50-1A).

III. ANSWERING EASTERN'S MAIN BRIEF.

As between themselves, the United States and Eastern Airlines are not adversaries on this appeal. Neither was a party in the suits in which the other was defendant. Therefore, there are no issues to be determined between the United States *vis-a-vis* Eastern Airlines. Nevertheless, in its main brief Eastern has seen fit to cross over into appellee's suits against the United States and to inject an argument of its own that the United States should be held liable.²⁶ Apart from this gratuitous gambol, however, there are in Eastern's brief a number of erroneous assertions which have direct bearing on the issues between appellee and the Government inasmuch as they are important to the question of tower negligence. These relate, first, to the meaning of a landing clearance and, second, to the responsibilities of a pilot to avoid other air traffic while landing his plane. We shall discuss these two points.

A. *Concerning the meaning of "cleared to land"*. (1) The meaning of this phrase was carefully explained by Mr. D. W. Rentzel, the then Administrator of Civil Aeronautics, who, as a witness for the Court, testified that a landing clearance "is intended to give the pilot *an authority to exercise his judgment* * * * to proceed with a landing" (X 2030A, quoted in Eastern's Brief at p. 42; emphasis ours). While purporting to accept and portray Rentzel's explanation, Eastern proceeds to insert factors which Rentzel, at no point in his testimony, expressed. Thus, Eastern blandly characterizes the landing clearance as an "order" and an "instruction" (Br. pp. 28, 41, 62, 64); it reads into

²⁶ Eastern (Br. p. 65) quite seriously argues, in support of its contention that it is entitled to judgment N.O.V., that there is another defendant (*i.e.*, the United States) available to compensate the victims for their losses. Perhaps we should suggest that this novel argument cuts both ways. Or that it is as frivolous as Eastern's contention (Br. pp. 34-35) that there is no evidence to support the verdict of the Airlines' negligence because it is "inconceivable" that its pilots would be guilty of negligence. But we do not ask this Court to absolve the United States simply because Eastern is available to meet the judgments. We prefer to rest our case on the more substantial grounds already discussed.

Rentzel's testimony words he never suggested, *viz.*, that such a clearance tells a pilot "there is no plane ahead of him" (Br. p. 9); it states that issuance of the landing clearance compelled its pilots to deviate from the prescribed landing pattern, that if they did not do so they would have violated the Regulations (Br. p. 41); indeed, it even goes so far as to say that, having been cleared to land, its plane "was where the tower *instructed* it to be * * * when it was struck" (Br. p. 64; emphasis ours).

None of these assertions, we submit, is correct. Actually, as Rentzel's testimony precisely demonstrates (X 2030A, 2038A) and as the Regulations clearly provide²⁷ and as we noted in our main brief (p. 46), a landing clearance is not an affirmative instruction but is only *permissive* in nature; it simply gives the pilot permission to exercise his own judgment to make an approach on the designated runway (X 2030A, 2036A, 2038-2040A). Having received a landing clearance, the pilot may, in his discretion, follow the landing pattern exactly, or he may deviate from the pattern, or he may make a short approach, as his judgment dictates (X 2039A). Accordingly, in these circumstances the tower personnel do not and cannot know what the pilot will do, nor can they tell just what path the plane will fly (*ibid.*). Of course, as Mr. Rentzel explained, even after a plane is given a landing clearance, the plane and pilot still remain subject to tower instructions (X 2030A, 2039A). That simply means that the tower can countermand the permission to land or can affirmatively direct the plane to alter its course, although normally it is not anticipated that the tower will issue such instructions (*ibid.*).

The distinction between a landing clearance being an affirmative instruction, as Eastern contends it is, and being merely permissive, as the Regulations and the Rentzel testimony demonstrate, is a significant one. The first implies a compulsion and control over the plane and its path of flight by the tower which definitely is not present in the second. If the clearance is an affirmative instruction, it means the plane is where it is because the tower ordered it

²⁷ 14 Fed. Reg. p. 3341, § 26.50-65.

to go there; but if it is permissive, the plane is where it is because the pilot, in his judgment, put it there. The direct responsibility for the safety and course of flight must therefore rest with the pilot, not the tower.²⁸

(2) Again, at pp. 43-44 of their Brief, Eastern is somewhat less than accurate when it states that the trial judge's charge to the jury as to the meaning of "cleared to land" was an adoption of Mr. Rentzel's definition. We refer particularly to Eastern's quotation of the court's charge that, upon receiving such a clearance, a plane can assume that other craft in the control zone do not constitute a hazard to it, or that no other plane has been similarly cleared. There is not a single word in Mr. Rentzel's testimony which in any way suggests that these assumptions are permissible, and as we have already noted in our main brief (p. 46, fn. 107), the regulations clearly preclude such assumptions.²⁹ Nor does Eastern cite any testimony of the tower witnesses that a clearance to land means that the pilot can assume that other planes will not constitute a collision hazard.

B. Concerning the pilot's responsibilities after receiving a clearance to land.—Eastern's brief (p. 30) makes an almost astonishing assertion when it says that, because of the complexities involved in landing a four-engined plane, it is not "incumbent" upon its pilots nor are they "required to be on the lookout for any other traffic" while landing their plane at a controlled airport. This argument is totally without foundation. The Air Traffic Rules (14 C.F.R., 1949 Ed., Part 60) impose rigid safety standards which must be followed by pilots, especially with regard to the avoidance of other air traffic. They draw no distinction whatever based upon the complexity of landing a particular type of aircraft, nor do they provide for

²⁸ 14 Fed. Reg. p. 3344, § 26.50-66(a); *ibid.*, pp. 3335-3336, § 26.50-61 (b) (1). We do not suggest that the tower is not supposed to issue such information as, in its judgment, may be needed to aid in preventing collisions. We do suggest that Eastern is wrong in arguing that because they received a landing clearance, its pilots were relieved of any responsibility to avoid other aircraft and that the responsibility shifted to the tower.

²⁹ See fn. 30, p. 20, *infra*.

a waiver of the rules in favor of pilots coming in to land. The rules state affirmatively that aircraft "shall be operated *at all times* in compliance with the [prescribed] general flight rules" (14 C.F.R., 1949 Ed., 60.10; emphasis ours). These flight rules, among other things, forbid the operation of a plane in such manner as to endanger others (*id.*, 60.12); they state that "lack of vigilance by the pilot to observe and avoid other air traffic" may be regarded as careless or reckless operation of an aircraft (*id.*, 60.12, note (c)); they provide that "no person shall operate an aircraft in such proximity to other aircraft as to create a collision hazard" (*id.*, 60.15); they state that "nothing in this part [*i.e.*, the Air Traffic Rules] relieves the pilot from the responsibility for taking such action as will best aid to avert collision" (*id.*, 60.14, first note); and they provide that, "when two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right of way, but it shall not take advantage of this rule to cut in front of another which is on final approach to land" (*id.*, 60.14 (e)).³⁰

Nothing in the rules exempts a pilot, whether he be flying the most complex or the most simple craft, from observing these standards. Nothing in the rules absolves the pilot (and co-pilot) from being constantly watchful for other traffic. The direct and ultimate responsibility for the safe operation of his craft is his alone (*id.*, 60.2). Only in an emergency situation can he deviate from the rules and then only "to the extent required by consideration of safety" (*id.*). True, the control tower is there to aid him, but the presence of the control tower and the landing clearance it issues do not relieve the pilot of his responsibility to avoid other air traffic.³¹ Eastern's con-

³⁰ It is important to observe that this rule clearly recognizes that there will be occasions when two or more aircraft may be approaching for a landing at the same time. It underscores the trial judge's error in holding the tower negligent in issuing landing clearances for two planes at the same time.

³¹ While arguing in one part of its brief (p. 30) that its pilots did not have to watch for other air traffic, Eastern apparently finds no inconsistency in urging at a different place in its brief (p. 68) that when Bridoux was coming in for a landing he was under such an obligation.

tention that it was not "incumbent" upon their pilots "to be on the lookout for any other traffic" flies in the teeth of these rules. The argument is not only without merit but, if adopted, it would give legal sanction to permitting pilots to shut their eyes to other air traffic thus endangering the lives of passengers and fliers in direct contradiction to the safety promotion purpose of the rules. A decision holding in effect that the tower must act as the pilot's eyes would contravene the existing regulations, would require the tower to devote full time and effort to the landing operation of a single plane to the exclusion of all other duties, and would subordinate the tower's function to expedite and aid the numerous other aircraft (which generally are in the vicinity of a busy airport) to meet the convenience of a particular pilot, not to mention the increased hazards flowing from the loss of time involved in the tower's transmitting messages to the pilot, flowing from dependence upon perfect functioning of the tower radio transmitter and the plane's radio receiver, and from the possible human error in understanding the nature of the crisp directions given, etc. In short, safety would not be promoted but would be immeasurably endangered if this Court were to hold that the pilot need not be on the lookout to avoid other air traffic, but, instead, can rely solely on the tower as his back seat driver. That cannot be the correct rule. Neither Congress nor those who promulgated the regulations ever intended that the presence of a control tower should be a substitute for the use of reasonable care and caution on the part of pilots.

CONCLUSION

For the reasons stated, we respectfully request the relief prayed for in our main brief.

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JUNE 1954.

**APPELLANT'S PETITION FOR REHEARING
BY THE COURT IN BANC**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,017 and 12,018

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 12,017 and 12,018

UNITED STATES OF AMERICA, APPELLANT

v.

UNION TRUST COMPANY, ET AL., APPELLEES

APPELLANT'S PETITION FOR REHEARING BY THE COURT IN BANC

The appellant in the above entitled proceeding respectfully suggests and requests that the Court grant a rehearing *in banc* of this proceeding pursuant to Rule 26 of the General Rules of this Court and 28 U. S. C. 46 (c).

POINTS RELIED ON AS BASIS FOR REHEARING

1. This Court's decision holding that the United States is answerable in damages in a Tort Claims Act suit for negligence in the manner in which it regulates air commerce, imposes a liability which is virtually without precedent. The decision misapplies and conflicts in principle with *Dalehite v. United States*, 346 U. S. 15, and with the decisions of other Courts of Appeals. It fails to give appropriate scope to the governmental function exclusion of the Tort Claims Act, 28 U. S. C. 2674 and 2680(a), and contravenes the legislative purpose that claims based upon the negligent performance of regulatory activities shall be barred from the coverage of the Act.

2. Not only does this Court's decision greatly enlarge the potential liability of the United States in connection with the regulation of air commerce under the Civil Aeronautics

Act, but it also may have a very serious impact upon all regulatory activities conducted by the Government, for, under this Court's holding that only "policy level" acts are excluded by the statute's discretionary function exception, the Government may be subjected to liability for negligence in all regulatory activities at the so-called "operational level", including the negligent enforcement of law. Such a decision presents a question of grave importance.

While not conceding the correctness of this Court's decision on the merits, this petition for rehearing *in banc* is addressed primarily to the legal issues involved. If the petition is granted, therefore, it will not be necessary to review the factual issues which consume the bulk of the extensive record in this case, unless the Court should desire to review the merits as well.

SUMMARY OF FACTS PERTINENT TO THIS PETITION

1. *Nature of the litigation.*—As the result of a mid-air collision between an Eastern Air Lines DC-4 and a Bolivia-owned P-38 military type plane on November 1, 1949, near the Washington National Airport, in which the 55 persons aboard the DC-4 were killed, more than a hundred suits were brought in this and in other jurisdictions against Eastern Air Lines (operator of the DC-4), against Eric Rios Bridoux (the Bolivian pilot of the P-38), and against the United States (owner of the airport and operator of its control tower). Four test cases were chosen—two against the United States and two against Eastern and Bridoux—and it was agreed between the defendants and virtually all the claimants that the determination of liability in these cases shall be dispositive in the others.¹ The four actions selected had been brought by the executors of Mr. and Mrs. Ralph F. Miller, passengers in the DC-4. Those against the United States, under the Federal Tort Claims Act, were tried to the

¹ It was also agreed that the test cases shall be determinative on the question of whether the Wrongful Death Statute of Virginia or of the District of Columbia is applicable. Under the Virginia statute recoveries in death actions were limited to \$15,000 (Virginia Code, 1942, § 5787), but there is no limitation under the District of Columbia statute (16 D.C. Code 1201-1203).

court (*McGuire, D. J.*) and simultaneously those against Eastern and Bridoux were tried to a jury. The jury found Eastern negligent and liable for the accident, but Bridoux not. The district judge found the Government negligent in, and subject to liability for, the manner in which it had regulated air commerce at the Airport. Separate judgments in the amount of \$50,000 for the death of Ralph F. Miller and \$15,000 for the death of his wife were entered against Eastern and the United States.

On appeal to this Court (*Edgerton, Wilbur ^{K.} Miller and Fahy, JJ.*), the judgments against Eastern were reversed and its two cases were remanded for a new trial; the judgment against the United States relating to Mrs. Miller was affirmed, but the judgment relating to Mr. Miller was reduced to \$15,000 and as so modified was affirmed. The instant petition relates only to the two cases in which the Government was defendant-appellant.

2. *The facts*—The following is a brief resumé of the facts as stipulated by the parties, as found by the district court, and as revealed by the evidence:²

Eastern's DC-4 was en route from New York to Washington. When the plane was over Beltsville, Maryland, some 15 miles northeast of the Washington National Airport, it contacted the Airport control tower and at 11:38 A. M. received a clearance to enter a left *traffic pattern* for landing on runway number 3 (I 21-2A, 49-50A).³ One minute before,

² Record references are herein indicated as follows: the roman numeral refers to the volume of the printed Joint Appendix; the arabic number refers to the page of that volume; "Transcript" refers to the typewritten Transcript of Trial.

³ Airport control towers regulate and control air traffic operating in the vicinity of airports. Almost all control towers in the United States, regardless of ownership of the particular airport, are maintained by the CAA and operated by CAA employees (but see *infra*, pp. 16-17). These employees are known as air traffic controllers. Their functions are analogous to those of a traffic policeman at a busy highway intersection (II 273-4A, IV 862A, VII 1353A). Aircraft operating in the vicinity of an airport are required by Air Traffic Rules promulgated by CAB to maintain contact with the tower (14 C.F.R. § 60.18(b)).

A plane approaching Washington for a landing usually contacts

Bridoux had taken off from runway 3 in the P-38 (a used plane recently purchased by the Bolivian Government) for a test flight (I 37A).⁴

the airport control tower by radio when it is 15 to 20 miles away (VI 1260A, 1296A), and from that time on, until it lands, it remains in contact with the tower. In this initial call to the tower, the pilot may request landing instructions and the tower will respond by giving clearance *to enter the traffic pattern*, as distinguished from clearance *to land* (I 188-9A, VI 1260-IA). The traffic pattern is the prescribed path or flow of traffic around the immediate vicinity of the airport (see Pltf's Ex. 7, XI 2128A-3). A plane ordinarily may not enter the traffic pattern until it receives a tower clearance, and once within the pattern, it may not land until the tower gives a specific clearance to land (X 2036A, 2029-2030A; 14 Fed. Reg. pp. 3341-2, § 26.50-65(a) and (b)).

At the time of the initial radio contact, when the tower gives clearance to enter the traffic pattern, the traffic controller will also advise the pilot of wind conditions, the runway to be used, and he gives such traffic information as he deems pertinent. He requests the pilot to report again at a situs closer to the airport, usually at Hains Point (I 188-9A, VI 1260A, VII, 1346A). Upon reporting from the latter point, the pilot is advised of the traffic he is to follow and of his number in the sequence, or if he is the first aircraft in the pattern, he may be cleared to land at that time (*ibid*). If he is not first in the sequence, he is expected to continue flying around the airport in the pattern (X 2036A).

The path of a plane landing on runway 3 is prescribed by Regulation of the Administrator of Civil Aeronautics (see 14 Fed. Reg. pp. 6247-6250; Pltf's Ex. 7, XI 2128A-3; X 2108A). It is as follows: the plane enters the traffic pattern at a point northwest of the Airport and proceeds in a southerly direction to a point south of Alexandria (this is called *the downwind leg*), then it turns and proceeds east until over the Potomac River (this easterly flight is called *the base leg*), then it turns north and, after a slight S-turn, lines up with runway 3 for landing (this is called *the final approach*). However, once a plane receives a clearance *to land*, the pilot may deviate from this pattern if he so chooses, for a clearance to land, unlike affirmative instructions from the tower which are mandatory, is permissive in nature; it is intended as an authority to the pilot to exercise his discretion to proceed with a landing as his judgment dictates, consistent with the safe management of his plane (X 2030-9A.)

⁴ In attempting to test the P-38 during the week before, Bridoux had encountered trouble with the radio, with one of the two engines, and with the brakes (II 381-4A, III, 529-530A). The brakes and

Nine or ten minutes later, at 11:46-11:47 A. M., while both planes were south of the field on final approach for landing on runway 3, and at an altitude of about 300 feet, the two planes collided (I 21A, 49A). The district judge found that the collision occurred over the District of Columbia, that weather conditions and visibility were excellent and that both planes were visible to the tower personnel who knew that the planes were on converging paths and had adequate opportunity to warn them (I 22A, 50A). However, he made no findings whatever on the conflicting evidence as to what intervened during that crucial 9 to 10 minute interval, as to what warnings the tower had in fact sent to the planes, nor as to what messages were exchanged between the planes and the tower, nor as to the respective positions, the speeds and the rates of approach and descent of the two planes. It is wholly impractical for purposes of this petition to recount the extensive and often conflicting evidence relating to the crowded events of that crucial 9 to 10 minutes period preceding the fatal collision. We will touch in the briefest manner only on some of the high points of the testimony:

Glenn D. Tigner, one of the seven air traffic controllers on duty in the tower,⁵ testified that when the DC-4 re-

engine were repaired and a new radio was installed before November 1st (*id.*, IX 1783A). They seemed to be in good condition before take-off (II 391A, 395A).

⁵ Because of the great amount of traffic at and near the Airport and because the air traffic controllers are so busy when traffic is heavy, the controllers, although having specific assignments, of necessity work together as a team (I 207-8A). The Washington National Airport is the only civil airport owned and operated by the United States. It is the third or fourth busiest airport in the country. In 1949, there were in excess of 165,000 landings or take-offs, or an average of 450 per day, at the National Airport. CAA *Statistical Handbook on Civil Aviation*, p. 14, 21 (G.P.O., 1953). We are informed by CAA that during the busiest periods there have been 59 landings or take-offs per hour at the National Airport, and it is to be noted that it takes almost a full minute for a plane to move onto a runway, to accelerate and to take-off, and about the same time for a landing plane from the time it touches the ground until it leaves the runway. CAA *Staff Study: Washington Air Traffic Forecast*, pp. 41, 45 (Nov. 1950).

ported it was over Beltsville requesting landing instructions, he cleared it to enter the traffic pattern and advised the pilot to contact him at a point closer to the field (VI 1277-8A, VII 1346A). A little later, when the DC-4 was still north of the field, it contacted the tower, and Tigner cleared it to land on runway 3 (VI 1278-9A).

Shortly afterward, Tigner observed the P-38 at a high altitude, circling Alexandria, about 7 miles south of the airport (VI 1280A, XI 2160A-4). It was not then in the traffic pattern (IX 1862-4A, 1940A). Tigner was then talking to another plane (VII 1561A). An associate in the tower advised him the P-38 was requesting landing instructions (VI 1280-IA). He called the P-38, but received no acknowledgment (*ibid.*, VIII 1613-4A). He called again and, on receiving an answer, he cleared the P-38 to enter the left *traffic pattern* for runway 3, and asked the pilot to report when he was on his downwind leg, west of the airport (VI 1281A, 1303-4A). The message was acknowledged. The P-38 was then 5 miles southwest of the field, heading northwest, still circling toward the left (VII 1363).

When he next saw the P-38 it was about five miles southwest of the airport at an altitude of approximately 4,000 feet, but now heading northeasterly with its gear down, and it was in a steep and rapid descent (VI 1281-2A, XI 2160-5).⁶ At about that time, the tower alerted Eastern's DC-4 as to the presence of the P-38, and gave its position (I 89-92A, 119-122A; Transcript, 517-531). Observing the continued descent of the P-38, Tigner then called the P-38 by radio and directed it to make a 360 degree turn (so as to provide adequate space between the P-38 and the DC-4). He called, "Bolivian 927, make a 360 to your left.

⁶ It could not then be determined that the P-38 was making a straight-in approach for landing, because the clearance given moments before *to enter the traffic pattern* would permit the P-38 to descend from 4,000 feet to 1,200 feet (which is the minimum altitude of the traffic pattern) while heading northeast toward the airport (IX 1824A, 1940-1A). The fact that a plane's gear or flaps are down while flying in the pattern is neither unusual nor significant (VII 1511A, IX 1946A).

You are No. 2 to land. Traffic is an Eastern DC-4, turning final ahead and below you" (VI 1282A, 1304-5A, 1310A).⁷ But the message was not acknowledged, nor did the plane comply with the instruction (VI 1282-3A). Thinking that perhaps the Bolivian pilot did not know the meaning of the phrase "make a 360", Tigner then called, "Bolivian 927, turn left, turn left. You are No. 2 to land, following an Eastern DC-4 turning final ahead and below you" (VI 1283A, 1308A, VII 1368A, XI 2160A-5). But again there was neither an acknowledgment nor compliance (*ibid.*).

During these transmissions the DC-4 was on its base leg, roughly at a right angle to runway 3, turning all the time, from base leg into final approach (VI 1283A).⁸ When Tigner saw that the P-38 was not complying with his instructions, he called to the DC-4, "Eastern 537, make an immediate left turn. Traffic is P-38 above and behind you" (VI 1284A). The DC-4, which had gone only a quarter of a mile while actually on final approach (IV 734-5A, 743A, VI 1302A), started to level off at once and began a slight left turn when the P-38 overtook it from above and behind, and struck it (VI 1284A, 1305A). The DC-4 broke in two; the forward part fell in the Potomac River, the after part on the Virginia shore.

Bridoux, the Bolivian pilot, survived the accident. Testifying at the trial, he gave a different version. He testified that shortly after the P-38's take-off one of his two engines gave trouble (II 397-402A, III 491A), that he reported this to the tower and requested landing instructions (II 402-3A, 406-7A), that the tower responded "Land 2

⁷ An instruction from the tower that a plane is No. 2 to land does not constitute a *clearance to land* (VIII 1664A, VII 1447A). It merely indicates the plane's number in the traffic sequence. See fn. 3, pp. 3-4, *supra*.

⁸ After receiving its landing clearance, the DC-4 had apparently deviated from the prescribed landing pattern (see fn. 3, pp. 3-4, *supra*). Instead of proceeding southward on downwind leg until below Alexandria, the DC-4 made a short approach, turning eastward onto base leg while still north of Alexandria.

on runway 3" (II 411A, 416-7A).⁹ He understood this to be a clearance to land rather than merely clearance to enter the traffic pattern (II 416-7A, III 613-4A). He said that while flying downwind he observed a plane (not the DC-4) making an approach for landing and assumed that that was the plane in the sequence ahead of him (II 425A). He testified to flying the prescribed landing pattern and that, while flying north at an altitude of 1200 feet, he called the tower and advised that he was on final approach (II 431-3A). The tower, he said, responded "Bolivian P-38, prepare to land on runway 3" (*id.*). He acknowledged, then put his flaps down, reduced his speed and began an S-turn to line up with the runway (II 431-7A). He then heard over the radio, "Clear to the left, clear to the left" (II 438A). He thought the instruction was for someone on the ground (*id.*). He did not turn left or take any other action. The collision occurred two or three seconds later (II 438-9A).

3. *The decision of the district court.*—The trial judge found the control tower negligent in clearing both planes for the same runway at approximately the same time, and in failing to warn and keep each plane apprised of the other's activities.¹⁰ Rejecting the Government's defense that the claims are not cognizable under the Tort Claims Act, he held that when the Government assumed the responsibility of regulating air commerce and of regulating the flow of air traffic at a public airport, it also assumed a

⁹ In a statement to the CAB a few days after the accident, Bridoux said he did not regard his as an emergency situation (II 545-6A). He now took the opposite view (*ibid.*). But he admitted that a P-38 performs well on only one engine (III 523A) and that he had no trouble climbing to 3500 feet (III 491A).

¹⁰ Specifically, his finding was that the tower personnel were negligent in that, "*having in mind the respective positions of said planes in relation to each other and their speed of approach and descent:* (a) they failed to issue a timely warning to the Eastern plane concerning the P-38 being on final approach; (b) they failed to warn the P-38 that the Eastern plane was on final approach; (c) they cleared both planes for the same runway at approximately the same time; and (d) they failed to keep both planes advised of

duty of protecting the public from the hazards of such regulation, that violation of that duty creates private rights actionable under the Tort Claims Act (I 44A).

4. *The decision of this Court.*—On appeal, the Government argued, as it had below, that the operation of control towers by CAA to regulate air traffic is a uniquely governmental activity, comparable to a traffic policeman regulating highway traffic, and that there could be no analogous private liability in like circumstances as required by 28 U.S.C. 2674; *Feres v. United States*, 340 U.S. 135, 141-142; *Dalehite v. United States*, 346 U.S. 15, 43-44. This Court's panel rejected the argument, stating that private airport owners could operate private towers subject to compliance with CAA regulations, and that there would be private liability for the negligent operation of such private towers. The Court also rejected the Government's contention that the "discretionary function" exception (28 U.S.C. 2680 (a)) barred liability. The Court held that the discretionary function exception does not apply to operational details such as are involved in manning a control tower, that while "discretion was exercised when it was decided to operate the tower * * * the tower personnel had no discretion to operate it negligently" (slip op. p. 30). The Court ~~then~~ then held that the findings were sufficiently detailed and that there was sufficient evidence to support them, even though "only slight" as to the P-38 having been cleared to land. Finally, the Court held (*Miller, J.*, dissenting on this point) that the trial judge erred in measuring the Government's liability by District of Columbia law (the place where the accident occurred) rather than by Virginia law (the place where the alleged negligent acts of the tower personnel occurred). See 28 U.S.C. 1346 (b). Application of Virginia law required modifica-

the activities of the other" (I 50-1A). Although the trial judge based his ultimate findings of negligence on the italicized preliminary facts, he never resolved the substantial conflict of evidence on those points nor made any findings concerning them. We believe his failure to do so constituted reversible error. See *e.g.*, *Kelley v. Everglade District*, 319 U. S. 415, 420, 422; *Dalehite v. United States*, 346 U.S. 15, 24, fn. 8. Moreover, we believe the ultimate findings of negligence are clearly erroneous.

tion of the judgment awarding \$50,000 for the death of Ralph F. Miller by reduction to \$15,000 (see fn. 1, *supra*, p. 2). With such modification, the judgments were affirmed.

ARGUMENT

Both the district court and the division of this Court which heard the appeal recognized that the principal question presented is whether the United States is subject to liability under the Tort Claims Act for the manner in which it regulates air traffic (I 44A; slip op. p. 20). Both courts held that a claim of that kind is actionable under the Act.

The imposition of liability upon the United States for alleged negligence in the performance of a purely regulatory function is virtually without precedent. It is a liability which has far reaching and seriously mischievous implications. It collides with the limiting and exclusionary language of the Tort Claims Act (28 U.S.C. 2674, 2680 (a)), and it squarely contravenes the Congressional purpose clearly set forth in the legislative history, that the Act shall not permit suit on a claim arising from the performance of governmental functions, *particularly those of a regulatory nature*. It ignores the admonition of the Supreme Court, emphasized repeatedly, that the effect of the Act "is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres v. United States*, 340 U.S. 135, 142; *Dalehite v. United States*, 346 U.S. 15, 43-44; *United States v. Brown*, 348 U.S. 110, 112-3. The imposition of liability for the manner in which the United States performs a regulatory function, and the rationale employed in reaching that result, present questions of grave importance in the administration of the Tort Claims Act.

I

This Court Erred in Holding That the United States Has Consented to Suit for the Manner in Which It Performs Regulatory Activities.

1. *The Tort Claims Act excludes claims based upon regulatory activities.*—If one thing is certain concern-

ing the legislative purpose of the Federal Tort Claims Act, it is that Congress intended to exclude from the coverage of the statute claims arising from acts of a regulatory nature. Congressional committees reporting on the bills which ultimately became the Act stated time and again that although it was intended to permit suit for claims arising from the ordinary common law torts of employees of regulatory agencies, such as a claim based upon a collision with a regulatory agency's vehicle, the Act was designed to preclude claims based upon the regulatory activities of those agencies. See committee reports cited and quoted in *Dalehite v. United States*, 346 U.S. 15, at fn. 21, p. 29. Other Courts of Appeals have consistently adhered to this Congressional intent to bar claims footed on alleged negligent or improper regulation, and the Supreme Court has consistently denied certiorari when review was sought. *Schmidt v. United States*, 198 F. 2d 32 (C.A. 7), certiorari denied, 344 U.S. 896 (wrongful acts in SEC investigation); *Matveychuk v. United States*, 195 F. 2d 613 (C.A. 2), certiorari denied, 344 U.S. 845 (negligence of OPA re rent increase); *Chournos v. United States*, 193 F. 2d 321 (C.A. 10), certiorari denied, 343 U.S. 977 (negligence re grazing permit).

In the *Dalehite* case itself one of the principal bases of negligence charged to the Coast Guard, a charge which was the subject of numerous specific findings of fact made by the trial court in that case, was Coast Guard negligence in enforcing existing Army, ICC, and Coast Guard safety regulations.¹¹ The Supreme Court refused "to enter into an examination of these factual findings," saying that this type of claim, regardless of negligence, was barred by Sections 2674 and 2680(a) of the Act (346 U.S. at 42-44). See *infra*, pp. 20-22.

This Court's decision in the instant case, holding that the United States is liable for alleged negligence in the regulation of air traffic, is in direct conflict with these decisions and with the legislative purpose of the statute. It

¹¹ The district court's Findings of Fact in *Dalehite* appear in Vol. 2, pp. 882 *et seq.*, 900, 831 *et seq.*, of the printed record filed in the Supreme Court, Oct. T. 1952, No. 308.

is also contrary to a vast body of American case law holding that state and municipal governments are not answerable in damages for the negligent performance of regulatory activities designed to protect the safety and health of the community, and specifically for the negligent regulation of highway traffic. The Tort Claims Act was intended to retain to the United States this same immunity. Cf. 86 Cong. Rec. 12021; *Dalehite, supra*, 346 U.S. at 42-44.

The exclusion of claims based upon asserted negligence in the performance of regulatory activities is but one segment of the broader exclusion from the Act of claims arising from the performance of acts of a uniquely governmental nature. "The legislative history indicates," the Supreme Court said after extensively reviewing that history, "that * * * it was not contemplated that the Government should be subject to liability for acts of a governmental nature or function." *Dalehite, supra*, 346 U.S. at 27-28. "* * * Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions." *Ibid.*, at 32. This limitation constitutes one of the very basic restrictions upon the coverage of the Act. The exclusionary purpose was carried out through the vehicle of three sections of the Act: Section 1346(b), 28 U.S.C., provides that the United States shall be liable for the negligent acts of its employees "under circumstances where the United States, if a private person, would be liable to the claimant;" Sec. 2674 emphasizes that the United States assumes liability only "in the same manner and to the same extent as a private individual under like circumstances;" and Sec. 2680(a) excludes claims based upon the exercise of a discretionary function or duty. (Emphasis added).

These provisions indicate two overlapping but independent branches to the governmental function exclusion. The first, marked out by Sec. 2674 (and 1346(b)), bars recovery when the claim, viewed in all the circumstances, can give rise to no analogous private liability. It bars claims based upon the malfunctioning of a uniquely governmental activity (such as the enforcement of law); since private

persons normally do not engage in such functions, there can be no parallel liability of a "private individual under like circumstances". The second branch, based on the "discretionary function" exception of Sec. 2680(a), bars claims founded on discretionary conduct or duties even though the activity involved may have its private counterpart. The *Dalehite* opinion crystallizes and applies both branches of the governmental function exclusion. The first part of *Dalehite*, relating to the alleged negligent manufacture, bagging and shipment of the fertilizer (activities which had private counterparts), explained and applied Sec. 2680(a). The second part of the opinion, relating to the asserted negligence of the Coast Guard in its regulatory, its fire fighting, and its other public duties (activities which, like those in this suit, are uniquely governmental and have no true private analogy), applied Sec. 2674. Claims based upon negligent performance of regulatory activities fall within the bar of both branches of the exclusion.

This Court erred, we submit, in holding both aspects of the governmental function exclusion inapplicable.

2. *Sec. 2674 bars claims arising from negligent performance of regulatory activities.*—Sec. 2674 limits the Government's liability to that of a private individual in like circumstances. This restriction to "like" circumstances prohibits the imposition of liability upon the United States for activities undertaken in a special governmental context. Sec. 2674 bars a claim (a) which arises from an activity which is characteristically or uniquely governmental, and (b) the essence of which is the negligent performance of or the failure to perform the activity *itself*. By characteristically or uniquely governmental, we mean those activities which now are, or historically have been, regarded as the special function of government, as distinct from activities normally carried on by private persons or groups. For example, the regulation or licensing of professional and commercial activities; the prevention and fighting of fire; the apprehension of criminals and the furnishing of police protection;

weather forecasting; safety and sanitary inspections; and highway traffic control.¹²

Where the claim is of this nature, it is unnecessary to look beyond Sec. 2674 to find that recovery is barred, even though the challenged conduct also may be within the classical meaning of the words "discretionary function" as used in Sec. 2680(a). Regardless of whether "discretion" is involved, the determinative factor is the characteristically governmental nature of the activity which itself, through its failure to function properly, caused plaintiff's damage. There can be no analogous private liability in like circumstances where the activity is uniquely within the province of government. The Act permits suit only on "recognized" common law tort actions; it does create "novel and unprecedented liabilities." *Feres v. United States*, 340 U.S. 135, 141-2; *Dalehite, supra*, 346 U.S. at 43-4; *United States v. Brown*, 348 U.S. 110, 112-3.

3. *There is no analogous private liability.*—a. In deciding whether the test of Sec. 2674 is met, the allegedly negligent acts of the air traffic controllers must be examined not in isolation, but in the background of the activities involved, for it is not some of the circumstances which determine whether there is analogous private liability, but *all* of them. *Feres, supra*, 340 U.S. at 142; *Dalehite, supra*, 346 U.S. at 43.

Civil aviation in all its phases was made the subject of intensive and exclusive regulation by the federal govern-

¹² We do not, of course, contend that official conduct merely tending in some way to promote these governmental ends is necessarily excluded from coverage. A claimant is not barred from suit in the routine case of a collision with a CAA truck carrying CAA's mail. There, the gravamen of the complaint would not be that the particular agency negligently performed its specific statutory function (regulation of air commerce). So far as that complainant is concerned, whether or not the agency attained its objective (proper regulation) would be wholly irrelevant to his claim. He is interested only in the careful performance of the intermediate step of driving a truck (an activity which has its private parallel). The Tort Claims Act was intended to permit such a suit, but not where the gist of the claim is alleged negligence in the performance of the governmental activity *itself* (regulation of air commerce).

ment under the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. 401 *et seq.* See *Northwest Air Lines v. Minnesota*, 322 U.S. 292, 303. Pursuant to that Act, regulations have been promulgated which cover such subjects as minimum standards for the design, construction, performance, inspection and maintenance of aircraft; qualifications for issuance of certificates to airmen, aircraft and air carriers; the operation of the business of air transportation, its routes, services, equipment, etc. All air traffic is governed by regulations issued by CAB.¹³ The CAA is empowered to establish and operate air navigation facilities wherever necessary, and is authorized "to provide necessary facilities and personnel for the regulation and protection of air traffic" (49 U.S.C. 452(a), 456). Under this and other authority, the CAA has established a vast and intricate system of civil airways ("air highways") and air navigation facilities, including hundreds of aeronautic communications systems, radio range stations, beacons, radar installations, etc. Among the most important facilities maintained by CAA for the regulation and protection of air commerce are the airport control towers. When operating within the vicinity of an airport, aircraft are required to maintain contact with the tower so as to receive any instructions which may be issued, and, when issued, such instructions must be obeyed.¹⁴ The regulations set forth standard procedures for the operation of all control towers, specifying among other matters, the positions where aircraft are to be given clearances, the procedures for determining the runway to be used and for effecting separation of planes in the traffic pattern, the radio techniques to be employed, a standard lexicon and phraseology to be used, the nature of the information to be given to pilots concerning traffic and field conditions, etc.

The control tower is the starting and the terminal point of this extensive network of regulation and control of air

¹³ See 14 C.F.R. Part 617. The regulations applicable in 1949 are set out in 14 Fed. Reg., p. 3327 *et seq.*

¹⁴ See fn. 16, *infra*, p. 16.

commerce. Its function is regulation in the most direct manner provided under the 1938 Act. The directions which the tower operator gives to aircraft carry the binding authority of law. When he affirmatively instructs planes—as distinguished from giving a clearance, which is only *permissive* in nature¹⁵—to enter or leave a traffic pattern, or to ascend or descend to a particular altitude, or to make a right or left turn, etc., his instructions must be obeyed.¹⁶ The failure or refusal to obey may result in punitive and remedial sanctions such as monetary civil penalties, suspension or revocation of a pilot's certificate, etc.¹⁷ In that sense, his directions are of the same legal quality as the regulations themselves.

Since no private person has this characteristically governmental power of regulation and control, since no private business undertakes this service for the benefit of interstate air commerce and the community at large—indeed, since any unauthorized interference with air navigation by a private individual is expressly forbidden and is punishable as a felony by fine and imprisonment (49 U.S.C. 622(c))—there can be no parallel liability of a private person “under like circumstances.” Therefore, as in *Feres* and as in *Dalehite*, the negligent acts complained fail to meet the test of Sec. 2674 and are not cognizable under the Tort Claims Act.

b. While recognizing the barrier of the Section 2674 governmental function argument, this Court held it did not apply in this case. The Court reasoned that, before CAA existed, private airport owners constructed and operated their own control towers; that although the CAA has gradually been taking over the operation of all the towers in the country, there were in 1949 and still are a number of towers

¹⁵ See fn. 3 at p. 4, *supra*.

¹⁶ 14 C.F.R. §§ 60.19, 60.21, 60.10. Only in emergency situations which require immediate decision and action may the pilot deviate from an instruction by the tower or from the prescribed Air Traffic Rules. 14 C.F.R. §§ 60.2, 60.21.

¹⁷ See 49 U.S.C. 559, 560(a) (5), 621; see also, E. Duval, *The Enforcement of Safety Regulations by the CAA*, 35 Calif. L. Rev. 280 (1947).

which have not yet been taken over by CAA;¹⁸ that while such towers are subject to CAA inspection,¹⁹ may be operated only by persons examined and licensed by CAA,²⁰ and must be operated in accordance with CAA procedures and techniques,²¹ "Nevertheless, these non-CAA controllers are not government employees, *and perform no governmental function*" (slip op. p. 23; emphasis added). The Court went on to say that a private airport owner "would of course be liable for the negligence of privately employed tower operators" (citing no authority), hence there is analogous private liability in the present case.

The key to this holding is, first, the assumption that private tower operators perform no governmental function, and second, the assumption that there would be private

¹⁸ Beginning in 1941, three years after the Civil Aeronautics Act was enacted, Congress appropriated funds for the maintenance and operation of a number of towers by CAA. During succeeding years, through other appropriations, CAA was able to take over, construct and operate additional towers in steadily increasing numbers. In 1943, it was operating some 100 towers. By November 1949, when the instant accident occurred, it was operating 165 of the nation's 200 towers. The number has increased since then.

The so-called private towers are, for the most part, located at private airfields maintained by aircraft manufacturing companies and flight training schools which have little or no public traffic. In determining whether funds should be appropriated to CAA to operate towers at airfields that do have public air traffic, the Appropriations Committees of Congress, in cooperation with CAA, apply a point system to measure the density of the public traffic. When the airfield attains a stated minimum of traffic points, funds may be appropriated, although, for reasons of economy, that may not always be the case. See, e.g., *Hearings before the Subcommittee on the Committee on Appropriations*, U.S. Sen., 80th Cong., 1st Sess., on *H.R. 3311*, pp. 971, 975-6; *Hearings before the Subcommittee of the Committee on Appropriations*, H. of Reps., 80th Cong., 2d Sess., on the *Dept. of Commerce Appropriation Bill for 1949*, pp. 223-7; S. Rep. No. 343, 80th Cong., 1st Sess., p. 6; S. Rep. No. 435, 81st Cong., 1st Sess., p. 7.

¹⁹ A certificated controller is prohibited from controlling air traffic with facilities which the CAA has determined to be inadequate. 14 C.F.R. 26.31.

²⁰ See 49 U.S.C. 401(6), 560 (a) (2), and 14 C.F.R., Part 26.

²¹ 14 C.F.R. § 617.3; 14 Fed. Reg. p. 3328.

liability for the negligence of private tower operators. There is, we submit, error in both assumptions.

No private airport operator himself, as distinguished from the CAA tower, has the power today to regulate and control civil aircraft in air commerce, not even within the designated control zone above and surrounding his airport, for all navigable airspace has been placed in the public domain and is subject to exclusive federal control. 49 U. S. C. 180; cf. *United States v. Causby*, 328 U. S. 256; and see *supra*, pp. 14-16. Such regulation~~y~~ can be exercised only because CAA has delegated the authority to do so to the non-CAA air traffic controller. This delegation of authority to others to regulate air traffic at some sites does not and cannot detract from the fact that the regulatory activity involved is governmental any more than the existence of privately employed special police alters the essentially governmental character of the functions of the public police in preserving the peace. It is extremely doubtful that when the non-CAA traffic controller regulates air commerce, through the authority delegated to him by CAA, such a *respondeat superior* relationship exists with his employer with reference to this activity as would result in vicarious liability. It is elementary that vicarious liability rests upon the master's *right to control* his servant in the activity furthering the master's business. Even assuming that the regulation of public air traffic is in furtherance of his master's rather than the community's business, it is patently obvious that the private airport owner cannot exercise any control over the non-CAA tower operator's conduct in regulating traffic. Such conduct is governed exclusively by CAA Regulations. Once in the tower, the tower operator's paramount duty is to regulate and expedite public air traffic. In the event of conflict between that public duty and any private obligation or command imposed by the employer, the controller is required to adhere to the former.

It would seem that the traffic controller in these non-CAA towers is analogous to a special policeman. As such he acts in a dual capacity of public officer and private employee. It is well settled that special policemen, licensed by state authority, but employed by a private master, are

public officers deriving their authority from the state and, when performing public functions, they are subject to the same rules as apply to public police. "In other words, special policemen are public officers when performing their public duties." *Labor Board v. Jones & Laughlin Co.*, 331 U. S. 416, 429, 431, *Dempsey v. N. Y. C. & H. R. R. Co.*, 146 N. Y. 290, 40 N.E. 867; *Thornton v. Missouri P. R. Co.*, 42 Mo. App. 58; *New York C. & St. L. R. Co. v. Fieback*, 87 Ohio St. 254, 100 N. E. 889; *Neallus v. Hutchinson Amusement Co.*, 126 Me. 469, 139 A. 671. For that reason the employer is not liable for the wrongful acts of a special policeman when such acts are done in his capacity as a public officer as distinct from acts performed primarily as a servant. *McKain v. B. & O. R. Co.*, 65 W. Va. 233, 64 S. E. 18; and see cases in *Note*, 23 LRA (N. S.) 289; 55 ALR 1204-9. Whether, in a particular instance, the employee is acting as a public officer rather than as a private servant may be a question of fact. *Seymoure v. Director*, 53 App. D. C. 316, 290 Fed. 291.

Airport traffic controllers perform essentially the same function as a policeman regulating traffic on the highways. There is a great body of case law holding that, because the activity is governmental, states and municipalities are not liable for negligence in the regulation of traffic on the highways.²² These cases provide the closest analogy to the instant situation. They were completely ignored by the decision of the Court. They are representative of an even larger body of American case law reflecting an almost universal rule that, absent specific legislative mandate, the negligent performance of, or the negligent failure to perform, governmental duties relating to the protection, safety and health of the community gives rise to no private actionable claim. These duties are owed to the public at

²² The cases are legion. Only a few will be mentioned: *Ferrier v. City of White Plains*, 262 App. Div. 94, 28 N.Y.S. 2d 218, leave to appeal denied, 287 N.Y. 852 (policeman misdirected auto); *Dorminey v. Montgomery*, 232 Ala. 47, 166 So. 689 (negligent maintenance of traffic light); *Powell v. Nashville*, 167 Tenn. 334, 69 S.W. 2d 894 (negligence re stop sign); *Doughty v. Phila. Rapid Transit Co.*, 321 Pa. 136, 184 A. 93 (negligent regulation of one-way street); *Roberson v. District of Columbia*, 86 A. 2d 536 (D.C. Mun. Ct. of App.) (negligent regulation of vehicles on sidewalks).

large, not to individual members of the public. The enactment of laws designed to accomplish such purposes and the duty of their execution are the primary kind of functions for which a government exists. If they fail to achieve their objective, even though through negligence, the government is not answerable in tort. These functions are traditionally regarded as "governmental" or as "discretionary." *Dalehite, supra*, 346 U. S. at 43.

4. *Sec. 2680(a) bars claims arising from negligent performance of regulatory activities.*—The second branch of the governmental function exclusion, Section 2680(a), excludes recovery for conduct traditionally characterized as discretionary even though the activities involved are comparable to those carried on by a private person. While stating that the words "discretionary function" mean a product of "policy judgment and decision" and "the discretion of the executive or administrator to act according to one's judgment of the best course" (346 U. S. at 36, 34), the Supreme Court in *Dalehite* did *not*, as this Court's decision assumes, limit the discretionary function exception merely to high level policy judgment and deny it to discretionary acts at the "operational" level. On the contrary, after holding that the words cover "Not only agencies of government * * * but *all* employees exercising discretion" (346 U. S. at 33; emphasis added), the Supreme Court set out *verbatim* plaintiffs' argument on that very point, which is closely parallel to this Court's holding, and then refused to accept the limitation, saying that, "It is unnecessary to define, apart from this case, precisely where discretion ends" (346 U. S. 35).²³

²³ The words "discretionary function" express the concept that it is not the place of the courts to revise, supervise or control executive conduct involving the exercise of judgment, choice or discretion of a public character. The discretion exercised by an air traffic controller is entirely different in quality from that of the mail truck driver (compare slip op. pp. 31-2). In exercising his judgment, the controller must consider factors which are peculiarly public and governmental, factors which a private person is not concerned about. The controller regulates and controls the conduct of others; his instructions carry the binding authority of law and the sanction of legal penalty. Even the dissent in *Dalehite* agreed that when

The point which this Court's decision overlooks is that it is not the level or echelon of the public official which determines the application of the discretionary function exception; rather, it is the discretionary nature of the act itself. Thus, in cases like *Costley v. United States*, 181 F. 2d 223 (C. A. 5) and *United States v. Gray*, 199 F. 2d 239 (C. A. 10), cited by the Court (slip op. pp. 25-6), where the exception was held inapplicable, the acts which caused the damage were not themselves discretionary; these acts had been preceded by some discretionary conduct, but the discretion was spent before the wrongful acts occurred and had no proximate relationship to the tort. Similarly as to the public works project involved in *Johnston v. District of Columbia*, 118 U. S. 19 (slip op. 30), discretion was exhausted before the negligent conduct occurred. In the instant case, however, the alleged acts of negligence were themselves discretionary (see fn. 23, *supra*, p. 20). They were regulatory in essence and, like the acts of the policeman directing traffic at an intersection, they do not create liability on the part of the government.

Underscoring this Court's erroneous reading of the *Dalehite* opinion are its statements, first, that the Coast Guard's failure to police the shipboard loading of the fertilizer was a policy level decision, and second, that had the Coast Guard decided to supervise the loading, "we have no doubt the United States would have been liable for any casual negligence of its personnel acting at the operational level" (slip op. pp. 29, 30). The first statement, if valid at all, can relate only to the *Dalehite* trial court's finding that the Coast Guard had negligently failed to promulgate appropriate safety regulations, for, the issu-

a governmental "official exerts governmental authority in a manner which legally binds one," the discretionary function exception applies (346 U.S. at 59). The controller's duty is "to promote the safe, orderly and expeditious movement of air traffic" (14 Fed. Reg. p. 3327, 3328). A private person has no duty to safeguard the public or to expedite traffic. The warnings and information which a traffic controller must give to aircraft in flight is, by the applicable Regulations, left to his judgment (e.g., 14 C.F.R. § 617.26(b)).

ance of regulations presents a policy question. But the trial court's findings went much further. He held that the Coast Guard had been negligent in its enforcement of *existing* safety regulations, and negligent in the manner in which it fought the fire at Texas City. There is nothing in the *Dalehite* opinion which indicates that the latter negligence resulted from policy decisions. Actually, it is the statutory duty of all Coast Guard personnel to enforce existing safety regulations; they had no choice or decision, policy or otherwise, to make in that regard. Such enforcement is done at the "operational level", and unquestionably it was that operational level negligence which was referred to by the Supreme Court when it spoke of the Coast Guard's "failing to supervise" and "failing to police the shipboard loading" (346 U. S. at 42, 23-4). Since it was the Coast Guard's duty to supervise and police the shipboard loading, and since the trial court in *Dalehite* held that that duty was performed negligently, it follows that the second statement (above) of this Court is squarely contradictory to the actual holding of the *Dalehite* opinion (346 U. S. at 42-44). It is to be noted, moreover, that the Act makes no distinction between negligent acts and negligent omissions. 28 U. S. C. 1346(b). Therefore, assuming proximate causation, the negligent supervision of the loading would necessarily receive the same treatment before the Court as did the negligent failure to supervise. Both are excluded by the exception.

In any event, it is difficult to understand why this Court ignored the negligent fire fighting phase of the Supreme Court's opinion. Surely that was negligence at the "operational level", and devoid of policy decision. The fact that the Supreme Court excluded the claims rooted in such negligence demonstrates the error of injecting an operational level vs. policy level distinction when the activity which itself gives rise to the claim, is discretionary or governmental.

II

The Importance of the Questions Presented Justifies a Rehearing In Banc.

This Court's decision that the United States is answerable in damages, under the Tort Claims Act, for the manner in which it regulates air commerce is of far reaching importance. We emphasize again that it is a liability virtually without precedent. While this case (which is a test case controlling many other pending suits) relates only to control towers at airports, the principles announced directly affect all so-called "operational level" regulation of air commerce under the Civil Aeronautics Act. Indeed, the decision will have a serious impact upon every regulatory activity undertaken by the Government. Under this Court's reasoning, if FBI agents negligently fail to prevent a bank robbery, the United States could be held liable under the Tort Claims Act. The theory would be, since private companies furnish private police to protect banks against robbery, when the United States undertook to perform the same function "it assumed a role which might be and was assumed by private interests" (cf. slip op. p. 23), and the FBI agents act at the "operational level". But see *contra*, *Goodwill Industries of El Paso v. United States*, 218 F. 2d 270, 272 (C. A. 5). Similarly, since there are private weather forecasting services and since weather forecasters are "operational level" employees, the United States could be held liable under the Act for negligent weather forecasts. But see *contra*, *National Mfg. Co. v. United States*, 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967. And, since there also are private fire fighting organizations, the United States presumably could be held liable for negligence in extinguishing a fire. But see *contra*, *Dalehite*, *supra*.

Activities like these, police protection, weather forecasting, fire fighting, and certainly the regulation of air commerce, are dominantly governmental in nature. As such, claims based upon their improper functioning are excluded from coverage of the Tort Claims Act under Sections 2674 and 2680(a). This Court's decision, in conflict on this ques-

tion with the decisions of the Supreme Court and of other Circuits, may well open the gates to vast litigation in an area which Congress intended to be exempt from judicial review. It tends to inject an additional and confusing concept into the governmental function exclusion of the Tort Claims Act, for the Court's opinion indicates no standards or guides as to what is and what is not an "operational level" activity. It suggests, also, the burden of an enormous potential liability for, if correct, the decision will result in making the United States a guarantor of the faultless execution of regulatory and other uniquely governmental activities. Questions of such import warrant review by the Court *in banc*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should grant this petition for a rehearing *in banc*.

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MARCH, 1955.

CERTIFICATE OF COUNSEL

The undersigned, counsel for petitioners, certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

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